No. 90-5796-CFH
Status: DECIDED
CAPITAL CASE

Title: Jimmie Burden, Jr., Petitioner
v.
Walter Zant, Warden

Docketed:
September 24, 1990

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Nursey,Joseph M.

Counsel for respondent: Smith,Paula

Entry	Date	Note	Proceedings and Orders
1	Sep 24 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Oct 23 1990		Brief of respondent Walter Zant, Warden in opposition filed.
4	Oct 25 1990		DISTRIBUTED. November 9, 1990
5	Nov 6 1990		Record requested.
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21	Feb 1 1991		REDISTRIBUTED. February 15, 1991
23	Feb 19 1991		Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam.
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24	Feb 26 1991		Record returned to USCA for the Eleventh Circuit.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89-5796

JIMMIE BURDEN, JR.,

Petitioner,

v.

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals below improperly refused to accept, under 28 U.S.C. §2254(d), a state court finding of fact that Dixon, the state's primary witness, had testified at trial under a grant of immunity from prosecution and this improper refusal to accept the state factfinding was determinative of the Court of Appeals' decision.

II.

Whether petitioner, Jimmie Burden, was denied his right to conflict-free, effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where his counsel without petitioner's knowledge also represented, on the same charges, the state's primary witness who testified against petitioner at trial under a negotiated agreement for immunity from prosecution.

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Petitioner, Jimmie Burden, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

CITATION TO OPINIONS BELOW

On January 14, 1988, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia. The petition was denied on July 12, 1988. Burden v. Zant, 690 F. Supp. 1040 (M.D. Ga. 1988) (attached as Appendix A to this Petition). The United States Court of Appeals for the Eleventh Circuit issued an order on April 10, 1989, retaining jurisdiction and remanding the case to the district court for an evidentiary hearing on petitioner's conflict of interest claim. Burden v. Zant, 871 F.2d 956 (11th Cir. 1989) (attached as Appendix B to this Petition). An evidentiary hearing was held on June 1, 1989, and the district court issued its findings of facts and conclusions of law in an order dated September 20, 1989. Burden v. Zant, C.A. 88-6-3-MAC (M.D. Ga. Sept. 20, 1989) (attached as Appendix C to this Petition). The Court of Appeals affirmed the district court's denial of habeas corpus relief on May 29, 1990. Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990) (attached as Appendix D to this Petition). Petitioner's petition for rehearing with suggestion for rehearing en banc was denied on September 5, 1990 (a copy of the order is attached as Appendix E to this Petition).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 29, 1990, affirming the district court's denial of petitioner's petition for writ of habeas corpus. Rehearing and rehearing en banc were denied on September 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's case involved the Sixth Amendment to the United States Constitution which reads in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . . to have the Assistance of Counsel for his defense.

This case also involves Section One of the Fourteenth Amendment which states in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

On August 15-16, 1974, the bodies of Louise Wynn and her three children were recovered from Smith's Pond in Washington County, Georgia. Despite a massive police investigation which involved thousands of police hours and the questioning of several hundred witnesses, the crime remained unsolved some six (6) years later in 1980. Tr. at 449.[1] Furthermore, throughout this investigation Jimmie Burden was never considered a suspect in the crime or implicated in it in any way. Id. at 450.

On May 29, 1980, Jimmie Burden was indicted for an unrelated burglary in which the alleged victim was Acid Dixon's mother. Arrested in Harrington, Delaware, Burden was returned to Georgia on August 3, 1981. That day, Kenneth Kondritzer, the public defender for the Middle Judicial Circuit, was appointed to represent Burden on the burglary charge. On September 16, police arrested Henry Lee Dixon, better known as "Acid" Dixon, and charged him with the Wynn murders. Kondritzer was also appointed to represent Dixon. While in police custody facing these murder charges, Acid Dixon, for the first time, told a story implicating Jimmie Burden in the deaths while attempting to exonerate himself. Based on Dixon's statement, criminal warrants charging both Burden and Dixon with murder were issued. Kondritzer represented both parties on these charges. Kondritzer moved for and obtained a committal hearing for Dixon.[2]

At the committal hearing, Kondritzer again represented Dixon. The state presented a police officer's testimony that he had a statement from Dixon that exculpated Dixon and provided the sole evidence linking Jimmie Burden to the offenses. (Tr. State Habeas at 20, 92). At the end of the hearing, Kondritzer argued for a dismissal of the charges against Acid Dixon. Prosecutor Malone argued for binding Dixon over. Judge McMillan did not find probable cause to bind the charges against Dixon over to the

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1. "Tr." refers to the transcript of record of petitioner's trial.

2. Under Georgia law, an unindicted person who has been arrested is entitled to a preliminary or "committal" hearing to determine the existence of probable cause to detain the accused until a grand jury considers the evidence against him. See Ga. Code Ann. §17-7-23(a) (1982).

grand jury;[3] however, Dixon remained in custody under a $50,000 bond as a material witness. (Tr. Dixon Prelim Hrg. introduced at the district court evidentiary hearing).

After the committal hearing, Kondritzer continued to represent both Dixon and Burden.[4] He visited Dixon in jail and negotiated a deal with Prosecutor Malone that if Dixon testified against Burden "nothing would happen to him." Evid. Tr.[5] 28. The state trial judge, in his mandatory post trial report, specifically found that Dixon testified at trial under a grant of immunity from prosecution. Resp. Ex. 1 at p. 54. See Issue I, infra (a copy of this Trial Judge's Report is attached as Appendix F to this Petition). Dixon's trial testimony and the prosecutor's assertions at trial, as will be set forth in detail later in this petition, also support the fact that Dixon was granted immunity in exchange for his testimony.

Compared to public defender offices in large cities, the system of indigent representation in 1981 for the Middle Judicial Circuit of Georgia was relatively simple. There was a single Public Defender office, located in the small town of Louisville. There were only two attorneys in the office. One of the attorneys, Kondritzer, was the director or "boss". Evid. Tr. at 57. He had as his assistant, Michael Moses, who was hired in 1980 fresh out of law school. Id. at 48. The two attorneys often "switched off" on cases. Id. at 27,28. They also shared a secretary and a single set of case files. Id. at 25. Their responsibilities included representation of all indigents accused of felonies in the five counties in the Circuit. Id.

Once a case was received by the office of the public defender, the two attorneys were essentially interchangeable. Generally they would divide up the cases based on territory (Kondritzer would cover the northern part of the Circuit, Moses the southern part), but on any given day they might handle each other's cases for the sake of convenience. Evid. Tr. at 28.

In fact, Kondritzer and Moses would "switch off" on each other's bargained deals. As Kondritzer testified:

> "I'd have some deals worked out in Washington County and we'd switch off and I would go down to Toombs County and plead the defendant out to whatever deal Mr. Moses had worked out ahead of time and he would do the same up in Washington County."

Evid. Tr. at 27-28.

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3. Under Georgia law, this finding of no probable cause did not remove Acid Dixon from danger of prosecution for the murders. "A dismissal of charges based upon lack of probable cause does not bar subsequenst indictment and trial of a defendant on the same charges," Boyce v. State, 184 Ga. App. 578, 362 S.E.2d 229, 231 (1987), quoting Callahan v. State, 179 Ga. App. 556, 347 S.E.2d 269 (1986) (cites omitted), because "[t]he decision of the committing court 'settles nothing as to the guilt or innocence of the defendant.'" First National Bank and Trust Company in Macon v. State, 237 Ga. 112, 227 S.E.2d 20 (1976), quoting Hyden v. State, 40 Ga. 476 (1869).

4. Burden was tried on the burglary charges in December, 1981. Kondritzer represented him at trial. The alleged victim of this burglary was Acid Dixon's mother! Evid. Tr. 55-56.

5. "Evid. Tr." refers to the transcript of the evidentiary hearing held by the District Court on June 1, 1989.

The office of the public defender in the Middle Judicial Circuit was structured as a small law firm. The only difference was that the attorneys did not get to choose their clients and salaries were paid by the government. Kondritzer played the role of managing partner with Moses his junior associate. Under the supervision of Kondritzer, the caseload was divided between the two attorneys with an eye toward maximizing efficiency and economy. In all cases clients were represented by the office and never by one of the two attorneys acting on his own. If an attorney quit, the cases he was handling remained in the office and were taken over by the remaining attorney. The attorneys often conferred on cases and strategy, even if only one attorney at a time would handle a case in court.

On December 31, 1981, Kondritzer resigned from the public defender's office,[6] and Moses, the sole assistant public defender, became the public defender. Burden, 903 F.2d at 1360. Moses assumed responsibility in the representation of both Burden and Dixon. Prior to trial, Moses was told by both Kondritzer and Dixon that an agreement had been reached with the prosecution pursuant to which Dixon would not be prosecuted if he testified at Burden's trial. Evid. Tr. 49, 51. The only fair inference from the record is that it was Kondritzer, Jimmie Burden's lawyer, who secured this immunity agreement for the primary witness against Jimmie Burden.

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6. In his affidavit in the state habeas corpus court, Kondritzer affirmed that he represented Dixon until he left the Public Defender's office. R-1-12-Ex. 2 Affidavit of Kondritzer.

Moses represented Burden at trial. Dixon, who was also represented by Moses at the time of Burden's trial, was the state's primary witness against Burden. Over seven years after the bodies were discovered in Smith's Pond, Jimmie Burden was convicted and sentenced to die [7] on the basis of the almost wholly uncorroborated testimony of Dixon. At the conclusion of the trial, Henry "Acid" Dixon walked out of the courtroom a free man. Jimmie Burden never knew that his own attorneys also represented Dixon, the state's key witness, and had in fact helped secure Dixon's damning testimony for the prosecution.

Jimmie Burden was convicted on the thinnest of possible evidence. There was no physical evidence linking Jimmie Burden to the crime or even to the scene of the crime. The state was so desperate to present any physical evidence to the jury that they went out and bought a replica of the shotgun allegedly carried by Jimmie Burden, and then had none other than Acid Dixon identify it! Tr. at 645, 690.

It stretches credulity beyond the breaking point to believe

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7. Petitioner was convicted of four counts of murder and subsequently sentenced to death on each count on March 4, 1982. On appeal, the Supreme Court of Georgia affirmed the convictions and three of the death sentences; the fourth death sentence was vacated and remanded to the trial court for resentencing to life imprisonment. Burden v. State, 250 Ga. 313, 297 S.E.2d 242 (1982), cert. denied, 460 U.S. 1103 (1983). The conflict of interest issue was properly exhausted in a subsequent state habeas corpus proceeding in the Superior Court of Butts County, Georgia.

that Jimmie Burden committed this crime.[8] The state's theory, provided by Acid Dixon, was that Jimmie Burden was involved in a relationship with Louise Wynn and committed the crimes in a jealous rage. The tiny town of Sandersville, Georgia was descended upon by the best law enforcement team in Georgia; they stayed for two years and investigated extensively enough to arrive at a list of fifteen close contacts of Louise Wynn investigated as suspects. Jimmie Burden was not one of these.

Jimmie Burden was born and raised in Sandersville. His family lives there. Sandersville has only 5,000 residents. It is so small there are only a couple of traffic lights and no McDonalds. It is a tightly-knit community where gossip and rumor spread like wildfire. Everybody in Sandersville and the surrounding communities heard of the tragic crime at Smith's Pond. For two years an expert team of skilled investigators combed this highly charged community in search of evidence; hundreds were interviewed. Yet not one person mentioned the name of Jimmie Burden or even hinted he had any involvement or could have potentially had any involvement in the crime. His name never came up; he was never implicated. As far as the team of investigators and the people of Sandersville were concerned, Jimmie Burden might just as well have been living on the moon when this crime was committed.

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8. Even under the heat of attack and criticism from Burden's post-conviction counsel, Moses, who has more knowledge of the facts of this case than does perhaps anyone else, testified unequivocally at the state habeas hearing: "In my personal opinion, he's an innocent man." State Habeas Transcript (hereinafter "St. Hab. Tr.") 72.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

After originally remanding this case for an evidentiary hearing on petitioner's conflict of interest claim, see Burden v. Zant, 871 F.2d 956, 957 (11th Cir. 1989), the Eleventh Circuit Court of Appeals determined that petitioner's Sixth Amendment right to the conflict-free assistance of counsel was not abrogated. Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990).

The Eleventh Circuit held at the outset that due to petitioner's failure to object to the dual representation at the time of his trial, he would have to show that counsel labored under an actual conflict of interest which adversely affected his representation. Id. at 1358. Thus the court applied the standard of Cuyler v. Sullivan, 446 U.S. 335 (1979).

Proceeding under this analysis, the court held that there was no actual conflict of interest. The court reasoned that Kondritzer's representation of Dixon at his committal hearing did not prejudice Burden in any way. Burden, 903 F.2d at 1359. The court also held, contrary to a state court finding of fact, that there was no evidence that Dixon had been granted immunity from prosecution. Id. at 1360. Furthermore, the panel reasoned that since the murder charges against Dixon were dismissed, an actual conflict never developed from Kondritzer's representation of both Dixon and Burden. Id. at 1359.

Concerning petitioner's trial counsel, Moses, the court held that there was no evidence that Moses ever directly represented Dixon and even assuming, arguendo, that Kondritzer's representation of Dixon was imputed to Moses as a member of the

same public defender's office, the conflict of interest did not adversely affect Moses' performance at petitioner's trial. Id. at 1360. Although recognizing that an attorney cannot cross-examine a former client without incurring "divided loyalties," the court held that there was no adverse affect to petitioner's interests because Moses brought out every issue in cross-examining Dixon that a conflict-free attorney would have developed. Id. at 1361.

REASONS THE WRIT SHOULD BE GRANTED

I.

The Court of Appeals below improperly refused to accept, under 28 U.S.C. §2254(d), a state court finding of fact that Dixon, the state's primary witness, had testified at trial under a grant of immunity from prosecution and this improper refusal to accept the state factfinding was determinative of the Court of Appeals' decision.

The United States Court of Appeals for the Eleventh Circuit in its final opinion after remand to the district court stated that no evidence existed that Acid Dixon, the prosecution's chief witness whose uncorroborated testimony provided virtually the only evidence linking Jimmie Burden to the crime, testified under a grant of immunity from prosecution. The opinion stated: "There is no documentary evidence of any sort that attests to Dixon's having received immunity, and [state prosecutor] Malone testified at the district court evidentiary hearing that he did not recall any such agreement regarding immunity." Burden v. Zant, 903 F.2d at 1360. In fact, the entire decision rests upon this premise.

Contrary to this erroneous fact-finding by the Eleventh Circuit, the state trial judge, Superior Court Judge Walter McMillan, after presiding over all proceedings in both Dixon's and Jimmie Burden's cases, in his mandatory post trial report, succinctly found, "Also, Dixon was granted immunity from prosecution and the jury was properly informed of this fact and an appropriate charge was given by the court to the jury." Resp. Ex. 1 at p. 54; App. F at p. 8. This state court finding of fact, entitled to the presumption of correctness, 28 U.S.C. §2254(d), clearly states the reality that until recent court orders was never called into question.

Prior to the evidentiary hearing in the district court, there was no question ever raised concerning the fact that Acid Dixon had been offered a deal in exchange for his testimony. The only question raised at the evidentiary hearing was District Attorney Malone's failed recollection, and Malone clearly conceded that his recollection might be wrong: "Let me make this clear, I do not recall any conversations [with Kondritzer concerning immunity for Dixon]. That is not to say they did not occur. I do not recall them if they did occur." Evid. Tr. at 18-19 (emphasis added). All the other players -- Kondritzer, Moses, and Dixon -- recall the negotiations for Dixon's immunity. Even Malone, closer to the time of the facts at his closing arguments at trial, remembered the deal. It bears repeating: all the parties at some point acknowledged that a deal had been cut.

Prosecutor Malone:

> ". . . we may have offered him [Dixon] immunity. I think you realized that we did. I'll tell you that we did."
> Malone's closing argument, Tr. at 911;

Dixon:

> Q. [By Moses]: "Now Mr. Dixon, have you been promised anything for your testimony today?"
> A. [By Dixon]: "Immunity."
> Tr. at 649;

Kondritzer:

> "I remember [Assistant District Attorney Malone] saying, 'I'm not interested in Henry Dixon as long as, you know, if he's going to testify we're not interested in prosecuting him.'"
> Kondritzer, Evid. Tr. at 43; [9]

Moses:

> Q. [By Farmer]: "And as far as who worked out the immunity with Mr. Dixon or who worked, if you want to call it in street language, the deal for Mr. Dixon, you don't have any independent memory or independent knowledge of who did that do you?"
> . . . .
> A. [By Moses]: "Mr. Farmer, as I believe I told you . . . it's my recollection, I wouldn't -- if somebody could show me different, it could be different, but I believe Mr. Kondritzer did that."
> Moses, Evid. Tr. at 49.

The fact that the deal for immunity was not in writing is irrelevant. However informal the process leading to the deal or however informal the terms of the deal itself, informality cannot

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9. Kondritzer testified that his deal with Malone for immunity was conditioned on Dixon testifying against Jimmie Burden Evid. Tr. at 42-43.

be permitted to obscure the facts: a deal for Dixon was cut. The district court itself, in its Order recognized,

> "[a]fter the committal hearing Mr. Kondritzer had informal discussions with Chief Assistant District Attorney Malone which Mr. Kondritzer remembers resulting in 'an understanding, you know, as long as [Dixon] testified, nothing would happen to him." App. C at p. 4.

The fact that Kondritzer was representing irreconcilably conflicting interests when he arranged for one client (Dixon) to receive immunity by providing the state's only evidence against his other client (Jimmie Burden) is not diminished one iota simply because the deal is not in writing.

Under 28 U.S.C. §2254(d),

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . .

The state trial court's written finding that Acid Dixon testified in exchange for immunity from prosecution was entered upon the conclusion of Jimmie Burden's trial at which, of course, the state was fully represented. Federal courts are required to show a "high measure of deference" to such state fact findings. Sumner v. Mata, 455 U.S. 591, 590 (1982).

The Eleventh Circuit gave absolutely no reason for its refusal to afford the presumption of correctness to the state

court finding of fact. In fact, the Eleventh Circuit made absolutely no mention of the contrary state court fact-finding.

"When Congress provided in §2254(d) that a habeas court could not dispense with the 'presumption of correctness' embodied therein unless it concluded that the factual determinations were not supported by the record, it contemplated at least some reasoned written references to §2254(d) and the state court findings." Sumner v. Mata, 449 U.S. 539, 549 (1981) (emphasis in original). 28 U.S.C. §2254(d)(1-8) provide circumstances under which state fact-findings may not be afforded the presumption of correctness. The Eleventh Circuit made no reference to these circumstances and clearly in this instance none of them apply.

The Eleventh Circuit's erroneous failure to accept the fact of Acid Dixon's immunity infected and was critical to its decision on the conflict of interest issue. In analyzing counsel's dual representation of Dixon and Jimmie Burden the Eleventh Circuit, based on its erroneous fact-finding, held, " . . . Burden can no longer base his conflict of interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another." Burden v. Zant, 903 F.2d at 1361.

And, in focusing on the charges against Dixon being dismissed, rather than the fact of Dixon's immunity which the Eleventh Circuit failed to accept, the Eleventh Circuit held, ". . . we have already concluded that the potential conflict of interest lurking in Kondritzer's continued representation of

Dixon and Burden on the same murder charges never materialized because the charges against Dixon were dropped." Burden v. Zant, 903 F.2d at 1360.

Although the §2254(d) presumption of correctness is generally used against habeas corpus petitioners, it applies with equal weight when the state court findings of fact support the claim of a violation of constitutional rights. The Eleventh Circuit had no basis for failing to afford the presumption of correctness to this state court finding of fact which clearly reflected reality.

II.

> Whether petitioner, Jimmie Burden, was denied his right to conflict-free, effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where his counsel without petitioner's knowledge also represented, on the same charges, the state's primary witness who testified against petitioner at trial under a negotiated agreement for immunity from prosecution.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel, including the right to effective assistance of counsel free of conflicts of interest. In the case of a single attorney representing multiple defendants, the attorney must be free from conflicting interests which might arise in the zealous representation of each codefendant. Wood v. Georgia, 450 U.S. 261, 271 (1981). There are two separate and distinct tests under which a conflict of interest claim may be assessed.

When an attorney represents multiple defendants who face the same charges, the potential for a conflict of interest naturally

develops. In fact, it is inherent in "almost every instance of multiple representation." Cuyler v. Sullivan, 446 U.S. 335, 348 (1979). If a defendant or his counsel objects at trial to the joint representation, the court must conduct an inquiry into the possibility that a conflict might exist. It violates the Sixth Amendment for a trial judge to fail to respond adequately to such an objection. Under these circumstances, there is no need for the defendant to demonstrate that the conflict of interest had any adverse impact on his attorney's representation. Holloway v. Arkansas, 435 U.S. 475 (1978).

On the other hand, if no objection is made at trial, a defendant whose lawyer represented potentially conflicting interests can still establish that his Sixth Amendment right to the effective assistance of counsel was violated if he can satisfy the two-prong test articulated in Cuyler v. Sullivan, First, he must demonstrate that his lawyer labored under an actual conflict of interest. Second, he must demonstrate that this actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. at 348. Once an actual conflict of interest adversely affecting counsel's performance is established, prejudice is presumed. Id. at 349-50. ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.").

In sum, there are two different standards under which a defendant whose counsel labored under a conflict of interest may obtain relief, the choice of which depends upon whether or not

the defendant objected to the multiple representation at trial. First, if an objection was made at trial but the trial judge responded to it inadequately, then relief does not depend on the defendant's ability to show adverse impact (Holloway's "objection" standard). Second, even if no objection was entered, relief may still be obtained if the defendant shows that the conflict adversely affected his attorney's representation of his interests (Cuyler's "no objection" standard).

> 1. The Court of Appeals erroneously required petitioner to establish an adverse effect created by his attorney's conflict of interest when he was unable to object to the conflict at trial.

The Court of Appeals erroneously deployed the more stringent "no objection" test of Cuyler to petitioner's conflict of interest claim. Under the facts of this case, Burden's claim should have been assessed under the more lenient "objection standard" articulated in Holloway. At no time was Jimmie Burden aware that his attorneys were, while representing him, also representing "Acid" Dixon, the state's primary witness against him in this capital case. [10] Yet because this multiple representation was never brought to his attention, Burden was logically unable to raise any objection at trial. Although both his attorney and the trial judge knew about the conflict, neither discharged their obligation to inform Burden about the dual

10. While the court of appeals thought it was unclear whether or not Burden realized that Kondritzer was representing Dixon, the district court's opinion is silent on that matter. The record is, however, uncontroverted: Burden never knew that both Kondritzer and Moses were actively representing "Acid" Dixon. See Verified Petition for Writ of Habeas Corpus.

representation. Because he failed to bring his conflict of interest to the court's attention, Burden's trial counsel violated his ethical duty, "upon discovering a conflict of interest, to advise the court at once of the problem." Holloway v. Arkansas, 456 U.S. 476, 485-86 (1978); see also Cuyler v. Sullivan, supra, at 346 ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.").

Nor did the court ever conduct any inquiry into the potential threat this conflict posed to Burden's defense. Although there is generally no requirement that trial courts initiate inquiries concerning conflicts of interest due to multiple representations, special circumstances, such as where the court knows or reasonably should know a conflict exists, create the duty to inquire. Cuyler v. Sullivan, at 346-47. Judge McMillan, the Chief Judge of the Circuit, appointed the same public defender's office to represent both Jimmie Burden and Acid Dixon; he also presided both at Jimmie Burden's trial and at Acid Dixon's committal hearing. Judge McMillan knew, or reasonably should have known, that Burden's counsel was laboring under a conflict of interest. Id. Yet he failed to conduct any inquiry into the conflict and at no time did he advise Burden that the same public defender's office was representing the prosecution's chief witness against him. St. Hab. Tr. at 28, 30, 58, 94; see also the transcripts of the Unified Appeal Proceeding of Jan. 21, 1982, motion hearing and trial.

Trial court judges are obligated "affirmatively [to] advise the defendant[] that joint representation creates potential hazards which the defendant[] should consider before proceeding with the representation." Cuyler v. Sullivan, supra, at 352. "Whenever two or more defendants who have been jointly charged . . . are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel." Id. at n.2 (quoting ABA Project on Standards for Criminal Justice, Function of the Trial Judge §3.4(b)(App. Draft 1972)). The Eleventh Circuit, focusing mainly on trial counsel Moses' conduct, never once mentioned Judge McMillan's failing. Because Jimmie Burden never knew that his lawyer was representing the prosecution's chief witness against him, he never had the chance to object to his lawyer's conflict of interest.[11] His attorney and the trial judge were fully aware that a conflict or potential conflict had been engendered, but did not inform him.

As was previously noted, under Holloway, a conflict of interest claim is subject to a lower standard of proof when the trial judge, once informed of the conflict, conducts an inadequate hearing on the issue. It necessarily follows, however, that the prejudice must be compounded when, as in Burden's case, he received no hearing whatsoever because both his counsel and the trial judge -- both of whom were fully aware of

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11. Exacerbating the situation is the fact that Jimmie Burden is a person of very low intelligence who cannot read, write or express himself very well. St. Hab. Tr. at 71.

the conflict -- neglected to disclose the problem to him. This being so, Jimmie Burden's conflict claim should be subject to a standard no higher than if he had objected to the conflict at trial and his objection had not been given an adequate hearing.[12] Nonetheless, the Court of Appeals assessed Burden's conflict claim under Cuyler's "no objection" standard. The court offered no reason why this higher hurdle and not the lower one was more appropriate under these unusual circumstances. For this reason, certiorari should be granted.

> 2. The Court of Appeals erred in holding that petitioner's counsel did not labor under an actual conflict of interest which adversely affected their ability to represent him.

Even if the more demanding "no objection" standard is imposed, the record clearly indicates that petitioner is still entitled to relief. The Court of Appeals' assessment of the facts is unjustifiably myopic. Most importantly, its conclusions resoluted from a distorted and cramped understanding of the immunity from prosecution arranged for Dixon. Once the court endorsed this erroneous interpretation of the facts (see Issue I, supra), it was able in one fell swoop to absolve both Kondritzer and Moses of laboring under a conflict of interest. Conversely,

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12. The "objection" standard ordinarily applies to the context on which a single lawyer is representing two clients at trial. In this situation, the clients can quite literally see that the same attorney is representing them. On these unusual facts, however, Burden would not know there was a conflict unless facts someone told him about it. They did not.

once the immunity deal is properly understood and appreciated, it is plain that the conflict of interest crippled both of Burden's attorneys.

First, the court held that no immunity whatsoever had been arranged for Dixon. Burden v. Zant, 903 F.2d at 1360. Such an assertion cannot withstand a review of the record. It has been admitted by all parties at some time that a deal was entered into. All the relevant actors knew about it and were prepared to see to it that each side discharged its part of the bargain. All the relevant actors acknowledged that Dixon would not be prosecuted if he testified against Burden. See p. 13, supra.

Moreover, the deal's effect was clear: Dixon "was released the moment he testified." Moses, St. Hab. Tr. 65. Dixon, in other words, received the benefit of his bargain.

Despite this evidence, the Court of Appeals held that:

> The impression of a witness that he would not be prosecuted as long as he testified does not establish a grant of immunity -- formal or informal. And [sic] informal discussion that results in a defense attorney's understanding of the prosecution's current intentions in not negotiation of immunity.

Burden v. Zant, 903 F.2d at 1360. In State v. Hanson, 295 S.E.2d 297 (1982), the Georgia Supreme Court, when interpreting a non-prosecution agreement between the state and the defendant Hanson, said: "While a slavish adherence to contract law should be avoided, we find that analysis of the present agreement as a contract between the prosecutor and Hanson is useful." See also Smith v. State, 74 Ga.App. 777, 41 S.E.2d 541, 547 (1947) ("[O]n the ground of public policy, it has been uniformly held that a

State may contract with a criminal for his exemption from prosecution.") (quoting Ingram v. Prescott, 111 Fla. 320, 149 So. 369 (1933)). So to the extent that Georgia law requires the existence and content of a non-prosecution agreement to be construed in accordance with general principles of contract law, it should be clear that Kondritzer had indeed reached an agreement with Malone not to prosecute Dixon in exchange for his testimony. As was noted previously, all the parties to the agreement have openly conceded as much. Furthermore, however informal the process leading to the deal or however informal the terms of the deal itself, informality cannot be permitted to cloud the fact of the matter: a deal for Dixon was secured. After his testimony, which is the almost completely uncorroborated basis of petitioner's convictions and death sentences, Dixon walked away a free man.

The important inquiry in this case is how the deal undermined petitioner's representation. Only after the immunity deal is placed in proper perspective can Burden's conflict claim be fairly assessed under Cuyler's "no objection" standard. For once the impact of the deal is appreciated, it is impossible to credit the Eleventh Circuit's determination that Burden's counsel did not labor under an actual conflict of interest which adversely affected their performance.

First, both Kondritzer and Moses labored under an actual conflict of interest. The court unjustifiably minimized Kondritzer's role in the entire affair, even though it was Kondritzer who inflicted the initial (and most severe) damage on

Burden's defense by negotiating the immunity agreement and thereby setting the stage upon which Moses was later obliged to maneuver. Kondritzer began representing both Burden and Dixon on the murder charges in mid-September. Kondritzer represented Dixon at his committal hearing. Although the court found -- and Kondritzer argued -- that there was no probable cause to hold Dixon on the murder charge, he was nonetheless bound over as a material witness. Evid. Tr. 34. Kondritzer conceded that he continued actively to represent Dixon after his committal hearing. Although the court suggested in effect that Kondritzer was not simultaneously representing Burden and Dixon on the murder charges, Burden v. Zant, 903 F.2d at 1359, this finding is implausible. It is beyond dispute that Kondritzer arranged for Dixon's immunity on the murder charges after he had begun representing Burden on the burglary charge and after warrants had been issued for Burden's arrest on the murder charges. Once this deal was in place, it was Kondritzer's obligation, as Dixon's attorney, to insure that both the state and Dixon discharged their respective parts of the bargain. Moreover, Kondritzer's representation of Dixon did not cease when no probable cause could be found to hold Dixon on the murder charges.[13] On the contrary, Kondritzer arranged the immunity deal and continued to visit Dixon in jail in order to discuss his plight and to keep him abreast of "what was going on." Evid. Tr. 28-29. Kondritzer

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13. Furthermore, Dixon could still have been directly indicted. See fn. 3, supra. Certainly had he not testified against Jimmie Burden, he would have been.

was, in short, obligated to insure that the agreement yielded its intended benefits for Dixon, benefits which would be forthcoming only when he testified against Burden. No conflict could be more painfully clear, or, from where Jimmie Burden waits on death row, more lethal.

In a case that is factually very similar to this case, Hoffman v. Leeke, 903 F.2d 280 (4th Cir. 1990), the Fourth Circuit held that there was an actual conflict of interest. In Hoffman, the petitioner was convicted of being an accessory before the fact to murder for his role in a murder for hire scheme against his spouse's boyfriend. The evidence at trial showed that the murder was committed by a hired killer recruited by Hoffman's brother-in-law, George Moose, at Hoffman's request. Moose was the first person arrested during the murder investigation. Hoffman retained an attorney, J. M. Long, to represent Moose, and after being questioned several times himself during the investigation, Hoffman retained Long to represent himself as well. Id. at 282. Hoffman was subsequently arrested on the accessory charges. The day after his arrest, Long negotiated a verbal plea agreement for Moose, in which he agreed to testify for the state at Hoffman's trial in return for a reduced sentence.[14] Moose was the key prosecution witness against Hoffman. Id. at 283. The Fourth Circuit held that there was an actual conflict.

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14. Long was also retained by Kathy Danielson, who was the girlfriend of the paid killer. Long also negotiated a plea agreement in which she agreed to testify against Hoffman.

> It is difficult for us to understand, and indeed we do not, how advising one client to give a statement and testify to the essential elements of a crime allegedly committed by a second client is not a conflict of interest. From the outset of Long's representation of Hoffman, a conflict was patent. While representing Hoffman, Long advised Moose to give a statement which implicated Hoffman, and to agree to testify against Hoffman as part of a plea agreement. Hoffman was in the unacceptable position of having his attorney Hoffman, a conflict was patent. While representing Hoffman, Long advised Moose to give a statement which implicated Hoffman, and to agree to testify against Hoffman as part of a plea agreement. Hoffman was in the unacceptable position of having his attorney help the state procure a witness against him. There was at this point an actual conflict of interest.

Id. at 286. The court also found that the conflict of interest adversely affected petitioner's counsel, since counsel was unable to cross-examine the state's key witness, who was also represented by petitioner's counsel.

> To cross-examine Moose effectively, Long would have had to question his own client's truthfulness. This he could not do.

Id. at 287. It is clear from the record in this case that trial

counsel Moses was faced with this same problem at Jimmie Burden's trial.

Another very similar case is Fitzpatrick v. McCormick, 869 F.2d 1247 (9th Cir. 1989). In Fitzpatrick, a death-sentenced inmate was represented on retrial by the same attorney who represented a co-defendant at the original trial on the same charges. Both defendants claimed innocence and placed the blame on the co-defendant. Thus the two defense theories were in direct conflict. Id.at 1252. The Ninth Circuit held that there was an actual conflict which adversely affected the attorney's representation of Fitzpatrick.

Therefore, born when Kondritzer agreed to represent both Dixon and Kondritzer, the conflict grew when Kondritzer arranged immunity for Dixon. When Kondritzer procured Dixon's non-prosecution, he at the same time sacrificed his ability effectively to represent Burden. The conflict continued to fester when Kondritzer oversaw the agreement's execution in order to guarantee that both sides respected its terms. Because the Eleventh Circuit seemed more concerned to assess Burden's conflict claim in relation to Moses' conduct, it downplayed the central role which Kondritzer played in igniting the conflict.

The court of appeals also overlooked how the immunity deal, once in place, generated an untenable position for Moses. The court tried artificially and unrealistically to seal Kondritzer's initial conduct from Moses' later representation. Burden v. Zant, 903 F.2d at 1360. The two were, however, intimately and inextricably connected. When Moses succeeded Kondritzer as chief

public defender, he inherited Kondritzer's obligation to insure that Dixon fulfilled his promise to testify against Burden.[15] Before and during Jimmie Burden's trial, Moses was therefore operating under two patently conflicting obligations. He was, on the one hand, obligated to insure that Dixon provided severely incriminating testimony against Jimmie Burden. On the other hand, he was at the same time obligated to provide Jimmie Burden with the best defense he could muster.

Second, there can be little doubt that this actual conflict adversely affected both Kondritzer's and Moses' ability to represent Burden. A pre-trial and trial strategy designed to secure the only incriminating evidence against a defendant is perfectly appropriate for the prosecution. It is, however, utterly inappropriate as a defense strategy: it is not a defense at all, and it is profoundly incompatible with the defense attorney's duty of loyalty to his client. Once Kondritzer sealed the bargain with the state on Dixon's behalf, he foreclosed any possibility that a similar bargain might be secured for Burden. And because Dixon's testimony was not only so damning, but also

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15. Representation of two persons charged in the same offense by two members of the same firm is sufficient to establish a conflict of interest. See, e.g., United States v. Flannagan, 679 F.2d 1072 (3rd Cir. 1982); Ross v. Heyne, 638 F.2d 979, 983 (7th Cir. 1980); Zuck v. Alabama, 588 F.2d 436, 438 (5th Cir. 1979); United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977).

the only real evidence against Jimmie Burden,[16] sealing the deal for Dixon for all practical purposes sealed Burden's fate as well.

Moses' representation was likewise impaired. Unlike counsel who owed no loyalty to Dixon, Moses was unable to pursue any pretrial or trial strategy devised to discourage Dixon from testifying against Burden in the first place. Any effort Moses might have undertaken in this direction would have directly violated his duty to assist Dixon. Had separate counsel represented Dixon, and had Dixon decided not to testify, or to modify his testimony in favor of Burden, Moses would have been under no obligation to persuade Dixon otherwise. In fact, his duty of loyalty to Jimmie Burden would have required him not to do so. Finally, though the Eleventh Circuit found Moses' cross-examination of Dixon at Burden's trial adequate, Burden v. Zant, 903 F.2d at 1361, this assessment of Moses' performance overlooks an obvious failing: Moses never in his cross-examination suggested in the jury's presence that Dixon, not Burden, was in fact the murderer. It is precisely this inability to pursue viable avenues of defense that makes joint representation suspect. Holloway, at 490.

> [I]n a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations . . . .

16. Without Dixon's testimony, Jimmie Burden would clearly have been entitled to a directed verdict.

Id. Had the possibility that Dixon was the real murderer been starkly and straightforwardly presented to the jury, its judgment may well have been different.

Because they played a crucial and consistent role in procuring Dixon's testimony against Jimmie Burden, both Kondritzer's and Moses' ability to represent Burden effectively was adversely affected. Indeed, it is difficult to imagine an effect on representation more adverse than the effect of having defense counsel labor under the duty to secure incriminating testimony for one client against another. For this reason as well, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on counsel for the opposing party by United States Mail with adequate first-class postage attached thereon to: Ms. Paula Smith, Assistant Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, GA 30334.

This 21st day of September, 1990.

Joseph M. Nursey
Counsel for Jimmie Burden, Jr.

No. 90-5796

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JIMMIE BURDEN, JR.,

Petitioner,

v.

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX A

Burden v. Zant, 690 F.Supp. 1040 (M.D.Ga. 1988)

selections are insufficient to dispel a prima facie case of systematic exclusion." In other words, a mere denial of discriminatory intent will not suffice. This is not to say, however, that testimony alone is per se insufficient. We believe instead that testimony from the alleged discriminators should be viewed with a great deal of judicial scrutiny.

United States v. Perez-Hernandez, 672 F.2d 1380, 1387 (11th Cir.1982) (citations omitted).

[7] Out of the three jury commissioners who testified at the hearing, one stated that he made a specific attempt to include more black people on the jury list. The other two commissioners denied paying any attention to race and looked only at whether each person was an intelligent and upright citizen in accordance with the statute. One stated that they were instructed not to be biased. All three denied that they had excluded anyone because of their race. Nothing else was offered in rebuttal.

Respondent argues that if there was any abuse in the selection process it was in favor of putting blacks on the jury, not in excluding them. The statistics certainly do not bear this out and neither does the testimony of the jury commissioners.

There was very little testimony as to how the jury commissioners actually made their choices. They stated that they looked for intelligent and upright citizens but did not describe the criteria used to judge who was intelligent and upright. What the testimony of the commissioners boils down to is a denial of discrimination and an unsupported assertion that they followed the statute. This alone is insufficient to rebut the inference of discrimination. *Compare Perez-Hernandez*, 672 F.2d at 1387-88 (prima facie case rebutted by testimony concerning four specific factors used to judge who was qualified to serve as grand jury foreman).

Respondent has failed to rebut the prima facie case under the fair cross-section analysis as well. No evidence was presented to prove a significant governmental interest in the method of selection used by the commissioners.

VI. CONCLUSION

In accordance with the foregoing analysis it is the RECOMMENDATION of the Magistrate that the petition for habeas corpus relief herein be GRANTED. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this RECOMMENDATION with the Honorable Wilbur D. Owens, Jr., United States District Judge, WITHIN TEN (10) DAYS after being served with a copy thereof.

SO RECOMMENDED, this 20th day of May, 1988.

Jimmie BURDEN, Jr., Petitioner,

v.

Walter ZANT, Warden, Respondent.

Civ. A. No. 88-6-3-MAC (WDO).

United States District Court,
M.D. Georgia,
Macon Division.

July 12, 1988.

Petitioner sought habeas corpus relief from murder convictions. The District Court, Owens, Chief Judge, held that: (1) public defender's representation of material witness after charges against witness had been dropped and after witness' attorney had resigned as public defender and had turned file over to defender was not ineffective assistance; (2) admission of bad acts evidence against petitioner did not deprive him of due process; and (3) evidence supported convictions and death sentence.

Petition denied.

1. Criminal Law ⇐641.13(1)

Claims of ineffective assistance must be reviewed from perspective of counsel

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and must take into account all circumstances of case as they are known to counsel at time in question and as they are reflected in record. U.S.C.A. Const.Amend. 6.

2. **Criminal Law** ⇐641.13(1)

Counsel owes criminal client duty to be loyal, to avoid conflicts of interest, to consult with client on important decisions, to keep client informed of important developments, and to bring to bear skill and knowledge rendering trial reliable, adversarial process. U.S.C.A. Const.Amend. 6.

3. **Criminal Law** ⇐641.5

Client seeking to establish ineffective assistance arising out of conflict of interest must demonstrate actual conflict of interest and adverse affect on adequacy of representation. U.S.C.A. Const.Amend. 6.

4. **Criminal Law** ⇐641.5(6)

Public defender's representation of material witness against client after charges against witness had been dropped and after witness' attorney had resigned as public defender and transferred file was not actual conflict of interest, did not adversely affect defendant's representation of client, and was not ineffective assistance; public defender never reviewed witness' file and had no need to do so; confidences gained by attorney during representation of witness were not divulged to defender; and defender acted as any other attorney in impeaching and cross-examining witness. U.S.C.A. Const.Amend. 6.

5. **Criminal Law** ⇐641.13(2)

Client failed to establish that challenge to racial composition of grand and traverse juries would have been meritorious and that attorney rendered ineffective assistance by failing to challenge juries. U.S.C.A. Const.Amend. 6.

6. **Constitutional Law** ⇐268(10)
Criminal Law ⇐369.2(1)

Admission of bad acts evidence that state court found relevant as matter of Georgia law did not deprive petitioner of fundamental fairness and did not violate due process. U.S.C.A. Const.Amends. 5, 14.

7. **Constitutional Law** ⇐268(10)

Overwhelming evidence of guilt defeated argument that bad acts evidence constituted crucial, critical, and highly significant factor in prosecution against petitioner and defeated claim that admission of evidence violated due process, even if evidence was inadmissible under Georgia law. U.S.C.A. Const.Amends. 5, 14.

8. **Constitutional Law** ⇐270(1)

Petitioner did not have due process right to have jury decide on concurrent or consecutive life sentences after Georgia Supreme Court had overruled decisions giving jury that power. U.S.C.A. Const.Amends. 5, 14.

9. **Homicide** ⇐250

Evidence supported state conviction of habeas corpus petitioner for murder of mother and her children; driver testified that he had dropped petitioner and victims off at road leading to pond and picked up petitioner after returning; and victims' bodies were recovered from pond. 28 U.S.C.A. § 2254.

10. **Homicide** ⇐354

Gruesome murder of child victims' mother by multiple blows to head, and gruesome murders of young children by drowning or strangulation supported death sentence of habeas corpus petitioner. 28 U.S.C.A. § 2254.

Millard Farmer, Atlanta, Ga., for petitioner.

Paula K. Smith, Atlanta, Ga., for respondent.

OWENS, Chief Judge:

On January 15, 1988, petitioner Jimmie Burden, Jr. filed this 28 U.S.C. § 2254 habeas petition attacking his convictions in the Superior Court of Washington County, Georgia, on four counts of murder, and also attacking the three death sentences and one life sentence that he received for committing these offenses. Petitioner was represented by able counsel, Joseph M. Nursey, Esq. and Millard C. Farmer, Esq. Because of this representation, the court's

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normal practice of appointing counsel was not necessary. The parties have thoroughly briefed the questions involved in petitioner's case, and after reviewing the entire record, the court is now prepared to render a decision on Mr. Burden's petition.

I. Procedural History

Upon a trial by jury that commenced on March 1, 1982, petitioner was found guilty on all four counts of murder. The jury found the existence of four statutory aggravating circumstances and sentenced petitioner to four death sentences pursuant to O.C.G.A. § 17-10-30(b)(2). On direct appeal, the Supreme Court of Georgia affirmed the four murder convictions, affirmed three of the four death sentences, but with respect to the death sentence imposed for the murder of Louise Wynn, found that her murder was "mutually supporting" the imposition of the death sentence for the other three murders, and, therefore, only a life sentence was appropriate on this count. *See Burden v. State*, 250 Ga. 313, 297 S.E.2d 242 (1982). The Supreme Court of the United States refused to grant certiorari to review this decision of the Georgia Supreme Court.

Petitioner filed his first petition for writ of habeas corpus on July 13, 1983, in the Superior Court of Butts County. An evidentiary hearing was held on October 24, 1983, at which time petitioner was afforded an opportunity to present evidence to support his petition. Millard L. Farmer, Esq., Joseph M. Nursey, Esq. and Kenneth Rose, Esq. assisted petitioner in presenting his case. Following this hearing a second evidentiary hearing was set for March, 1984. Before that hearing could be held, however, petitioner notified the state court, in a letter dated March 1, 1984, that he had no additional evidence, other than an additional affidavit, to present to the court. The matter was thereafter briefed by the parties, and the Superior Court of Butts County denied relief in an order dated September 5, 1984. This order was subsequently amended on September 20, 1984, to find that petitioner had procedurally defaulted under Georgia law in bringing his jury composition claim. On March 5, 1985, the Supreme Court of Georgia denied an application for a certificate of probable cause to appeal, and the Supreme Court of the United States again denied certiorari.

Petitioner then filed a second petition for writ of habeas corpus in the Butts County Superior Court, in which he raised a single claim, namely, that Georgia's death penalty statute was discriminatorily applied against black people and persons accused of killing white people. The state habeas court found this claim to be successive, and dismissed the petition. The Supreme Court of Georgia denied an application for a certificate of probable cause to appeal on March 11, 1987. Finally, petitioner has filed the instant petition asserting claims previously raised in both his direct appeal and in his first state habeas petition. Having exhausted his state remedies, these claims are ripe for review.

II. The Evidence

The court has read the entire trial transcript, the transcripts of the hearings held in the state court system, the briefs of the parties filed in both the state courts and in this court, and the various orders entered by the state courts affirming petitioner's convictions. After reviewing this information the court finds that the Georgia Supreme Court's description of the evidence against Mr. Burden in *Burden v. State*, 250 Ga. 313, 297 S.E.2d 242 (1982), accurately reflects what the evidence, viewed in the light most favorable to the prosecution, showed. It is, therefore, set out here as the court's *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), finding:

> On the evening of August 15 and morning of August 16, 1974, four bodies were recovered from Smith's Pond in Washington County, identified as Louise Wynn and her three children, ages 2, 3 and 4. The autopsies revealed that Louise Wynn died from multiple blows to the head; that Marvin, age 4, and James, age 2, died from drowning; and that Melinda, age 3, died from strangulation. Louise was clothed only in an undergarment and a dress torn in half. The crime scene

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revealed an area of disturbed pine straw, possibly evidencing a struggle. Investigators also discovered there an automobile lug wrench with what appeared to be bloodstains.

After extensive investigation, law enforcement officials were unable to fix upon a suspect, and the case was placed in the unsolved file some two years later. In late 1981, Henry Lee Dixon, a nephew of Burden, came forward with information leading to the arrest and indictment of this defendant.

Henry Lee Dixon testified that on August 13, 1974, Burden came to his house and asked to ride to town with him. He then directed Dixon to a liquor store where Burden purchased a case of beer and some liquor. Burden next directed Dixon to drive to Louise Wynn's house. Burden, who had been drinking heavily all the while, went into the house, and after about 15 minutes returned with two older children, followed by Louise Wynn, who was carrying a baby. Burden told Dixon to drive, while he continued to drink, kissing and hugging Louise Wynn in the back seat. Dixon was then directed to stop along a dirt road leading to Smith's Pond, where Burden and the four victims got out of the car. Burden took from his car a shotgun, fishing poles and bait, and told Dixon to return later to pick them up. When Dixon returned he saw Burden walking down the road, he stopped and asked where the others were. Burden first said that Louise became angry and had gone to her mother's house. After Dixon wanted to go and get Louise Wynn, Burden said "he had [messed] up," that she "didn't act right" and he "hit her side the head with something" and that "she fell in the pond or he throwed her in the pond one." Dixon then asked about the children, and Burden replied, "I reckon I damn well know where they are at, too." When Dixon suggested going back to the pond, Burden threatened him with a shotgun if he ever related the event to anyone.

The day after the bodies were discovered, Burden broke a pool cue over Dixon's head when he saw him talking with others, and again warned him not to mention the events of Tuesday.

Several witnesses testified that Burden and Louise Wynn were keeping social company with each other, having seen them together at various places just prior to Louise Wynn's death.

Two other witnesses testified as to physical assaults and attempted sexual assaults made upon them by Burden at times when he had been drinking. One such witness attributed to Burden the threat: "[H]e told me that he was going to throw me in a pond like he did somebody else."

See Burden, 250 Ga. 313–14, 297 S.E.2d 243–44.

III. Allegations of Error

Petitioner Burden has presented eight grounds for habeas relief. His eight allegations of error are: (1) that Mr. Burden's trial counsel maintained an actual conflict of interest in his representation of Mr. Burden; (2) that Mr. Burden was denied effective assistance of counsel; (3) that the grand and traverse jury pools from which a jury was drawn in Mr. Burden's case was unconstitutionally composed; (4) that the trial court unconstitutionally admitted evidence of wholly unrelated "bad acts" allegedly committed by the petitioner; (5) that the trial judge improperly deprived the jury of its authority to sentence Jimmie Burden to either concurrent or consecutive life sentences; (6) that prosecutorial misconduct rendered Jimmie Burden's sentences of death fundamentally unfair; (7) that there was insufficient evidence to support the guilty verdict; and (8) that the jury instructions at the penalty phase of Jimmie Burden's trial failed to adequately guide and focus the jury's consideration of mitigating circumstances. The first three of these allegations of error constitute a claim under the Sixth Amendment for effective assistance of counsel and will be dealt with together. The remaining allegations of error will thereafter be discussed separately.

A. Whether petitioner received effective assistance of counsel

[1, 2] In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

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(1984), the Supreme Court determined that the standard to be applied in determining whether a petitioner has received effective assistance of counsel is whether the attorney's performance was deficient *and* whether that deficient performance prejudiced the defense. *See Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir.1986), *cert. denied* — U.S. —, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987). Claims of ineffective assistance of counsel must be reviewed from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question. *Id.* at 936 (quoting *Washington v. Watkins*, 655 F.2d 1346, 1356 (5th Cir.1981) (Unit A), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982)). This standard requires that the circumstances as known to petitioner's attorney at the time of the trial be reflected in the record. With respect to counsel's duty to avoid conflicts of interest, representation of the criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333 (1980). From counsel's function as assistant to the defendant derive the over arching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

[3] Conflicts of interest necessarily implicate a breach of counsel's duty of loyalty which is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067. To establish a Sixth Amendment violation, petitioner Burden must demonstrate that both an actual conflict of interest existed and that such conflict adversely affected the adequacy of Mr. Moses' representation. *Id. See also Smith v. White*, 815 F.2d 1401, 1404 (11th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 181, 98 L.Ed.2d 133 (1987); *Porter v. Wainwright*, 805 F.2d 930, 939–40 (11th Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987); and *Stevenson v. Newsome*, 774 F.2d 1558, 1562 (11th Cir.1985), *cert. denied*, 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986).

The first question the court must answer then is whether or not Mr. Burden has demonstrated an actual conflict of interest. "A mere possibility of conflict of interest does not rise to a level of a Sixth Amendment violation." (citations omitted). *Smith v. White*, 815 F.2d at 1404. In *Stevenson v. Newsome*, the court of appeals quoted from *Barham v. United States*, 724 F.2d 1529, 1535 (11th Cir.1984), which stated:

> If a defense owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. Interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

[4] In this case petitioner has demonstrated that the Washington County Public Defender's Office was initially brought in to represent Mr. Dixon after he and Mr. Burden were charged with the murders of Ms. Wynne and her three children. At the time of their arrest, the Public Defender's Office of the Middle Judicial Circuit consisted of two attorneys, Mr. Ken Kondritzer and Mr. Mickey Moses. Mr. Kondritzer represented Mr. Dixon at the committal hearing held in his case. The result of this hearing was that the state court found insufficient evidence to bind Mr. Dixon over on the murder charges, but held him in jail under a material witness bond. It was shortly after this committal hearing that Mr. Kondritzer resigned as Public Defender for the circuit and Mr. Moses was appointed to replace him. Mr. Moses was, thus, given all of Mr. Kondritzer's files, which included Mr. Dixon's case. No charges were pending against Mr. Dixon at the time Mr. Moses was given Mr. Dixon's file. Acting in his role as chief public

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defender, Mr. Moses went on to defend Mr. Burden at trial.

Looking at the evidence presented by petitioner in the state habeas hearing, the court finds that he has failed to demonstrate either an actual conflict of interest or that this alleged conflict adversely affected the adequacy of Mr. Moses' representation of Mr. Burden. When Mr. Moses was appointed to take Mr. Kondritzer's place as chief public defender, he acceded to all of the files in the public defender's office, both pending and closed. Of course, Mr. Dixon had previously been represented by the public defender's office in Washington County, but at the time Mr. Moses took possession of Mr. Dixon's file, the charges against Mr. Dixon had already been dropped by court action. Petitioner has presented no evidence to show that Mr. Moses reviewed Mr. Dixon's file, nor was there any testimony to the effect that certain confidences gained by Mr. Kondritzer during his representation of Mr. Dixon had been, in any, way, divulged to Mr. Moses. Finally, Mr. Moses was under no obligation to take any action to represent Mr. Dixon in his status as a material witness that could be viewed as detrimental to his representation of Mr. Burden. In fact, at the time of Mr. Burden's trial, the charges against Mr. Dixon had already been dropped; Mr. Dixon, through no help of Mr. Moses, had been granted immunity from prosecution; and the decision to hold Mr. Dixon under a material witness bond had already been rendered. Mr. Moses, therefore, could take no action to harm Mr. Dixon, and was thus left unbridled in his defense of Mr. Burden. The court is simply not prepared to find that a public defender's office is absolutely barred from defending any criminal defendant in a criminal trial wherein a potentially adverse witness who has been represented earlier by some attorney in that office may be called to testify. Petitioner must set out additional conflict evidence before he would be entitled to succeed on this type of Sixth Amendment claim. Accordingly, because petitioner has failed to present evidence of an actual conflict, the court finds that there was no actual conflict to render Mr. Moses' performance ineffective.

Even if Mr. Moses was acting under a conflict of interest at the time of his representation of Mr. Burden, petitioner has failed to show that Mr. Moses failed to do something that an attorney not acting under a conflict would otherwise have done. Mr. Moses brought out evidence of Mr. Dixon's bad character; he inquired into the fact that Mr. Dixon had once been charged with the same crimes alleged against Mr. Burden, and that as a result of his testimony he was not going to be prosecuted; he cross-examined Mr. Dixon about being in custody under a material witness bond; he brought out prior inconsistent statements made by Mr. Dixon; and he generally attempted to discredit Mr. Dixon's testimony. The court perceives of no issues that were not brought out by Mr. Moses that another attorney might have developed. Absent some evidence of actual prejudice, this court cannot find ineffective assistance of counsel. *Smith*, 815 F.2d at 1404.

[5] The second allegation of ineffective assistance derives from Mr. Moses' failure to challenge the Washington County grand and traverse juries used to indict Mr. Burden. At the state evidentiary hearing, petitioner's only evidence of discrimination in the selection of the juries used in Washington County was an affidavit signed by Mr. Kondritzer stating that he found substantial discrepancies in the jury pools being utilized by Washington County during this time period. *See* Affidavit of Kenneth Kondritzer dated February 29, 1984. Mr. Moses and Mr. Malone, the District Attorney for the Middle Judicial Circuit of Georgia, on the other hand, testified that they were unaware of any particular problems with the jury pools used in Mr. Burden's case, that they generally kept abreast of the racial percentages being selected for jury duty, and that the percentages being chosen appeared generally to be in line with the relevant population statistics. No additional evidence was proffered to this court beyond the evidence presented in the state court.

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Before this court can find ineffective assistance in not bringing a jury challenge claim, the court must first find that such a challenge would have been successful. Mr. Farmer and Mr. Nursey have had significant experience in bringing jury challenges, yet they have made no independent effort in getting relevant statistical data beyond the conclusory affidavit of Mr. Kondritzer. While the court recognizes that the state refused to provide petitioner with unlimited funds to pursue his jury challenge claim, the court believes that there were alternative methods available to petitioner and his counsel that would have allowed him to develop facts necessary to support a jury challenge claim. The burden being on the petitioner to prove discrimination in the selection of the grand and traverse juries, the court is unwilling to presume discrimination in order to decide whether failure to bring such a claim was ineffective. Accordingly, the court refuses to find that by not bringing a jury challenge claim, Mr. Moses' representation was ineffective. Petitioner having failed to show that a jury challenge claim would have been meritorious, petitioner simply has not met his burden in making out such a claim.

Finally, the court has reviewed Mr. Moses' overall performance in Mr. Burden's trial and in the direct appeals taken by him, and finds that Mr. Moses' performance was more than adequate to satisfy the Sixth Amemdment's requirement of effective assistance of counsel. Petitioner has not shown any facts to support his claim that Mr. Moses' representation fell below an objective standard of reasonableness, nor has he shown any prejudice resulting to his defense as a result of this representation. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Because he has utterly failed in proving these elements, petitioner's claim of ineffective assistance of counsel is totally without merit, and, therefore, must be denied.

B. Evidence of Bad Acts

Petitioner also contends that the trial court's introduction into evidence of certain bad acts allegedly committed by him was impermissibly prejudicial and denied him due process of law. In order to find a violation of petitioner's due process rights, evidentiary errors must be "of such magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause." *See Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.), *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976); and *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir.1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). The district court must decide whether the evidence is "material in the sense of a crucial, critical highly significant factor." *See Hills*, 529 F.2d at 401; and *Osborne v. Wainwright*, 720 F.2d 1237, 1238–39 (11th Cir.1983). Overwhelming evidence of guilt defeats the argument that such evidence constitutes a "crucial, critical, highly significant factor," and if overwhelming evidence of guilt is shown, any constitutional error would simply be harmless. *See Rose v. Clark*, 478 U.S. 570, 576–79, 106 S.Ct. 3101, 3105–07, 92 L.Ed.2d 460, 469–71 (1986).

[6, 7] The state court has found that the introduction of the "bad acts" evidence was relevant as a matter of Georgia law, and this court cannot say that its admission denied Mr. Burden fundamental fairness under these circumstances. *See Jameson v. Wainwright*, 719 F.2d 1125, 1127 (11th Cir.1983), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984). Further, even if this evidence was admitted in violation of Georgia law, there was still no violation of due process. The overwhelming weight of the evidence of Mr. Burden's guilt defeats his argument that evidence of the assaults committed by him at a later date constituted a "crucial, critical, highly significant factor" in the case against him. Accordingly, because this court must view the evidence in the light most favorable to the prosecution, and because the evidence against Mr. Burden viewed in this light is overwhelmingly against him, the court must conclude that the introduction of these bad acts did not deprive petitioner of his right to due process of law.

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C. The trial judge's statement regarding concurrent or consecutive life sentences to the jury

[8] At the penalty phase of Jimmie Burden's trial, the trial judge instructed the jury that it had no say as to whether any life sentences imposed would run concurrently or consecutively. Petitioner contends that it was within the discretion of the jury to decide the question of whether Mr. Burden should be given concurrent or consecutive life sentences. He also cites certain Georgia law which states that a jury is authorized to decide whether the life sentences it imposes should run concurrently or consecutively. *See Anglin v. State*, 244 Ga. 1, 257 S.E.2d 513 (1979). The state has shown, though, that the Georgia Supreme Court's decisions supporting petitioner's contentions were based upon an erroneous application of the law, and that these cases were subsequently overruled in 1985. *See Welch v. State*, 254 Ga. 603, 331 S.E.2d 573 (1985). Petitioner contends that despite this subsequent action by the Georgia Supreme Court, the law in 1981 was that a jury could require either consecutive or concurrent life sentences to be served if mercy was recommended. In this court's opinion, however, the fact that the law was being applied improperly before 1985 should not give petitioner a due process claim to have it so applied in his case. Habeas relief on this ground, therefore, must be denied.

D. Prosecutorial misconduct

Petitioner argues that certain statements made in the sentencing phase of Jimmie Burden's trial were so egregious that it rendered the death sentences in his case fundamentally unfair. After reviewing the statements in question, the court finds that the remarks made were not sufficiently improper to warrant habeas relief. Taken as a whole they were not so egregious as to render the death sentences fundamentally unfair, thus, in violation of his right to due process. Petitioner's cited case of *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), *cert. denied*, — U.S. —, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1986), does not require reversal of petitioner's convictions.

E. Insufficient evidence to support the guilty verdict

[9, 10] Viewing the evidence in the light most favorable to the prosecution, the court is persuaded that there was ample evidence to convict petitioner of the four murders involved in this case. Furthermore, the gruesome manner in which the victims were killed supports the sentences of death that he was given by the jury that found him guilty of committing those crimes. Accordingly, this allegation of error is also meritless.

F. The jury instructions—explanation of mitigating circumstances

After reviewing the instructions given on the issue of mitigation and considering the argument of the attorneys in this case, the court finds that there is no merit to petitioner's contentions that the instructions given in his trial were inadequate under the standards set out in *Peek v. Kemp*, 784 F.2d 1479, 1494 (11th Cir.1986), and *Spivey v. Zant*, 661 F.2d 464 (5th Cir.1981) (Unit B), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982). Finding no error, habeas relief must be denied on this final ground.

In conclusion, upon overwhelming evidence of guilt, this court finds that petitioner has been constitutionally convicted with effective assistance of counsel for the four murders he was charged with, and further finds that he was constitutionally sentenced to three death sentences and one life sentence for committing these offenses. His petition for writ of habeas corpus having been found meritless in all respects, is, therefore, DENIED in its entirety.

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APPENDIX B

Burden v. Zant, 871 F.2d 956 (11th Cir. 1989)

uori v. Alexander, 495 F.Supp. 641, 647 (S.D.N.Y.1980); Okla.Stat.Ann. tit. 12, § 1444.1 (1987). If plaintiff's own counsel did not perceive the possibility of a defamation claim until four years after the filing of the complaint, it is impossible for defendant to have gleaned from the complaint adequate notice of this theory of liability.

[5] Plaintiff next argues Fed.R.Civ.P. 15 requires that motions to amend be "freely and liberally granted," hence, the trial court abused its discretion by denying the motion. We review orders denying motions to amend under an abuse of discretion standard. *A.E. v. Mitchell*, 724 F.2d 864, 868–69 (10th Cir.1983). Because the action had been pending for over four years, through two sets of plaintiff's counsel and through lengthy discovery and legal maneuvering, we can find no abuse of discretion. *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C.Cir.1987). Because of our disposition of this case, we see no need to consider the other issues raised.

DISMISSED in part and AFFIRMED in part.

Jimmie BURDEN, Jr., Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

No. 88-8619.

United States Court of Appeals, Eleventh Circuit.

April 10, 1989.

Defendant who had been convicted of murder by Georgia state court petitioned for federal habeas relief. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, No. CIV-88-6-3-MAC, denied petition, 690 F.Supp. 1040, and defendant appealed. The Court of Appeals, Vance, Circuit Judge, held that habeas petition would be remanded to district court for development of evidentiary record regarding possible conflict of interest on part of petitioner's trial counsel.

Remanded.

1. Criminal Law ⇐641.5

Defendant is entitled to representation that is free from conflict of interest. U.S. C.A. Const.Amend. 6.

2. Habeas Corpus ⇐864(7)

Habeas petition would be remanded to district court for development of evidentiary record regarding possible conflict of interest on part of petitioner's trial counsel, based on petitioner's preliminary showing that same public defender's office had represented both petitioner and state's witness in connection with same criminal offense.

Millard Farmer, Joseph M. Nursey, Atlanta, Ga., for plaintiff-appellant.

Paula K. Smith, Office of the Atty. General, Mary Beth Westmoreland, Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court For the Middle District of Georgia.

Before TJOFLAT, FAY and VANCE, Circuit Judges.

VANCE, Circuit Judge:

In December 1981 a grand jury indicted Jimmie Burden on four counts of murder for the 1974 deaths of Louise Wynn and her three children. Burden's nephew, Henry Lee "Acid" Dixon, implicated Burden in the murders after Dixon was arrested for the crimes following a seven year investigation. A jury found Burden guilty of all four murders and he was sentenced to death on each count. The Georgia Supreme Court affirmed the four convictions and three of the death sentences; the

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fourth was vacated and remanded for resentencing to life imprisonment. *Burden v. State*, 297 S.E.2d 242 (1982). The United States Supreme Court denied certiorari. *Burden v. Georgia*, 460 U.S. 1103, 103 S.Ct. 1803, 76 L.Ed.2d 367 (1983). After exhausting his state remedies, Burden filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court denied the petition, 690 F.Supp. 1040, and this appeal follows.

[1, 2] One of the most serious issues Burden raises in his appeal is whether his trial counsel labored under a conflict of interest. A criminal defendant is entitled under the sixth amendment to representation that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). Because the record is inadequate to support resolution of this issue, we remand for an evidentiary hearing on petitioner's conflict of interest claim and express no opinion as to the other issues raised in his appeal.

The record reflects that the Public Defender's Office of Georgia's Middle Judicial Circuit was appointed to represent Dixon after his arrest in August 1981. Dixon, testifying at his commitment hearing under a grant of immunity, inculpated petitioner in the crimes for which Dixon was charged. The trial court did not find probable cause to bind Dixon over to the grand jury but ordered him to remain in custody as a material witness. After petitioner's arrest, the trial court appointed the same Public Defender's Office to represent petitioner. The Public Defender's Office at that time consisted solely of Kenneth Kondritzer, the Public Defender, and Mickey Moses, the Assistant Public Defender. In February 1982, before petitioner's trial, Kondritzer resigned and Moses became Public Defender. In an affidavit, Kondritzer states that he "continued to represent Henry Dixon until [he] left the Public Defenders' [sic] Office" despite the fact that the charges against Dixon had been dropped. Moses represented petitioner at trial.

The record leaves several important questions unanswered. It does not contain orders appointing either Kondritzer or Moses personally to represent Dixon and Burden; nor does it indicate which public defender, if either, negotiated Dixon's immunity agreement. It reveals little about the practices of the Public Defender's Office at the time Kondritzer was Public Defender and, specifically, nothing about Moses' relationship to individual cases in the office. Finally, it contains little information about the nature of Kondritzer's "continued representation" of Dixon after the trial judge declined to bind him over to the grand jury.

A comprehensive history of both Dixon's and Burden's representation is necessary for us to evaluate petitioner's conflict of interest claim. Accordingly, we retain jurisdiction of the case and remand it to the district court for an evidentiary hearing limited to the conflict of interest issue. The district court is requested to certify its findings and the record of its proceedings to us within ninety days of the issuance of this opinion. *See Walker v. Davis*, 840 F.2d 834, 839–40 (11th Cir.1988); *Green v. Zant*, 715 F.2d 551, 554 (11th Cir.1983).

REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH INSTRUCTIONS.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael RAPP, a/k/a Michael Hellerman, Charles J. Bazarian, Mario Renda, John A. Bodziak, Jr., William Smith, Defendants-Appellants.

No. 87-3180.

United States Court of Appeals, Eleventh Circuit.

April 27, 1989.

Defendants were convicted by jury in the United States District Court for the

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APPENDIX C

Burden v. Zant, C.A. 88-6-3-MAC (M.D. Ga. Sept. 20, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Filed at 7:10 P M
SEP 20 1989
Elaine W. Jones
DEPUTY CLERK, U. S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

JIMMIE BURDEN,
Petitioner,

vs.

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,
Respondent.

C. A. 88-6-3-MAC (WDO)

ORDER

On April 10, 1989, the United States Court of Appeals for the Eleventh Circuit remanded this 28 U.S.C. § 2254 death penalty state habeas case "for an evidentiary hearing on petitioner's conflict of interest claim."

On June 1, 1989, an evidentiary hearing on petitioner's conflict of interest claim was held. That hearing was transcribed and the parties then submitted proposed findings of fact and conclusions of law. All having been carefully considered, this court does hereby find the facts on this issue to be as follows.

Findings of Fact

Petitioner Jimmie Burden, Jr. was arrested on August 1, 1981, in Harrington, Delaware on a May 29, 1980, indictment from the Superior Court of Washington County, Georgia. The indictment charged that on May 8, 1980, petitioner burglarized the home of his sister, Willie Kate Dixon, in Tennille, Georgia. Petitioner was also arrested on a charge of interstate flight

to avoid prosecution. On August 3, 1981, petitioner was delivered to Georgia authorities and returned to Georgia. Respondent's Exhibit 1, p. 11 and Petitioner's June 30, 1989, filing, Tab 24.

At the time petitioner was returned to Washington County -- one of five counties (Candler, Emanuel, Jefferson, Toombs, and Washington) that make up the Middle Judicial Circuit -- indigent defendants were represented by a public defender, Kenneth Kondritzer, and an assistant public defender, Michael Moses, appointed pursuant to O.C.G.A. 17-12-7. Mr. Kondritzer was appointed on January 1, 1980, and Mr. Moses was appointed later that same year. The public defender's office, consisting of Mr. Kondritzer, Mr. Moses, and a secretary, was located in Louisville, Georgia. Mr. Kondritzer resided in Louisville, the northern part of the circuit, and Mr. Moses lived in Toombs County (Lyons), the southern end or part of the circuit; as a result Mr. Kondritzer and Mr. Moses "kind of divided the cases on a geographical basis." June 1, 1989, Transcript, p. 25. Mr. Kondritzer and Mr. Moses, according to now District Attorney Malone, each handled their own cases "independent of each other," and did not jointly try cases. June 1, 1989, Transcript, pp. 6, 7.

It was the responsibility of either Mr. Kondritzer or Mr. Moses to represent every indigent Middle Judicial Circuit defendant who desired counsel. While the judges, by letter, would sometimes request one of them to represent particular indigent defendants, orders appointing one of the public defenders to represent particular defendants were not entered.

Petitioner Jimmie Burden, Jr., an indigent, was represented by Public Defender Kenneth Kondritzer on the indicted charge of burglary after his return to Georgia on or about August 3. While the trial judge's report filed April 29, 1982 (Respondent's Exhibit 1, p. 47), indicates that as to the murder charges Public Defender Kondritzer began representing petitioner Burden on August 3, 1981, it is apparent that the trial judge in making that entry confused the two unrelated cases against petitioner -- burglary of his sister's home and murder of Ms. Wynn and her three children -- and in his murder case report entered the date on which Mr. Kondritzer began representing petitioner on the then only outstanding charge of burglary. Petitioner was not even charged by criminal warrants with the Wynn murders until September 15, 1981 -- six weeks later -- and not indicted for those murders until December 7, 1981 -- five months later. Public defender Kondritzer then must have begun representing petitioner on the only outstanding indictment of burglary on August 3, and sometime after warrants for murder were filed on September 15, 1981, have begun also representing petitioner on the charges of murder. The evidence does not indicate when that representation actually commenced. Since petitioner was already indicted and soon to be tried for burglary and was not even indicted for murder, Mr. Kondritzer most likely concentrated on petitioner's burglary case and waited until the murder indictment was returned on December 7, 1981, to begin work on that case.

The September 15, 1981, criminal warrants charging petitioner with the August 13, 1974, Wynn murders were based upon a statement

given to Chief Deputy Sheriff Mack Rogers by petitioner's nephew, Henry Lee Dixon. Based upon that statement, warrants also charging Henry Lee Dixon with murder were secured. Mr. Kondritzer as public defender had to represent Dixon. In doing so, Mr. Kondritzer obtained a committal hearing for Dixon which was held on November 19, 1981, in Washington County. Respondent's Exhibit A is a transcript of that hearing. Mr. Dixon was then incarcerated in Jefferson County, so Mr. Kondritzer waived his presence. The only witness was Chief Deputy Rogers who testified as to the statement given him by Henry Lee Dixon on September 15, 1981, at the Clarke County jail during an interview. The interview resulted from information received from an informant telling of Dixon having driven Jimmie Burden, Louise Wynn, and her children to a point near the pond where petitioner Jimmie Burden had allegedly killed Louise Wynn and her children. At the conclusion of Chief Deputy Rogers' testimony, the trial judge ruled that the state did not have probable cause to hold Henry Lee Dixon on a charge of murder, but did have sufficient evidence to hold him as a material witness. Bond was set at $50,000, and Henry Lee Dixon was held first until an indictment was returned against petitioner on December 7, 1981, and thereafter until petitioner was tried in March, 1982, for murder.

After the committal hearing Mr. Kondritzer had informal discussions with Chief Assistant District Attorney Malone which Mr. Kondritzer remembers resulting in "an understanding, you know, as long as he testfied, nothing would happen to him." June 1, 1989, Transcript, p. 28. Mr. Kondritzer saw Mr. Dixon

in jail and discussed his plight, and from time to time in response to his questions would tell Mr. Dixon what was going on.

According to Chief Assistant District Attorney Malone transactional immunity, if and when granted, was formally agreed to by the district attorney and all the parties. He has no recollection nor is there any other evidence of transactional immunity being granted to Henry Lee Dixon.

Mr. Dixon, during petitioner's murder trial, testified on cross-examination that he was promised immunity by Mr. Rogers and Mr. Boyd when he was interviewed in the Clarke County jail. Neither Mr. Dixon nor any other witness testified that Public Defender Kondritzer secured a promise of immunity for him.

On December 8, 1981, petitioner was tried and convicted for the May, 1980, burglary of his sister, Willie Kate Dixon's, house; he was represented by Public Defender Kondritzer. The burglary charges were totally unrelated to the murder charges; Henry Lee Dixon was not a witness in the burglary case.

On short notice, Public Defender Kondritzer resigned and left as of December 31, 1981, and Assistant Public Defender Michael Moses was appointed as public defender effective January 1, 1982. Prior thereto, Mr. Moses had not represented petitioner as to either his burglary charge or his murder charges; neither had Mr. Moses assisted Mr. Kondritzer in any way in his representation of petitioner. Mr. Moses also had not represented nor assisted Mr. Kondritzer in representing Henry Lee Dixon. June 1, 1989, Transcript, p. 55, et seq.

As public defender, Mr. Moses inherited petitioner's murder case and in the course of preparing it for trial interviewed Henry Lee Dixon for the first time. Respondent's Exhibit 1, p. 647 and June 1, 1989, Transcript, p. 55, et seq. Based upon that interview and a transcript of the November 19, 1981, committal hearing of Henry Lee Dixon, Public Defender Moses vigorously cross-examined Henry Lee Dixon when he testified against his uncle, petitioner Jimmie Burden. Respondent's Exhibit 1, pp. 647-687. At the conclusion of Henry Lee Dixon's testimony Public Defender Moses opposed the prosecutor's motion that Mr. Dixon's material witness warrant be dissolved, and the trial court agreed that Mr. Dixon should remain in custody as a material witness until the trial was completed. Respondent's Exhibit 1, p. 688.

Conclusions of Law

Petitioner Jimmie Burden, as to the charges of murdering Louise Wynn and her children, received representation by Public Defender Michael Moses free from conflicts of interest as guaranteed to him by the Sixth Amendment. Wood v. Georgia, 450 U.S. 261, 271 (1981).

SO ORDERED, this 20th day of September, 1989.

Wilbur D. Owens, Jr.
United States District Judge

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A P P E N D I X D

Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990)

entitled to relief on his *Ake* claim, but I reach that conclusion for a different reason. Assuming, without deciding, that *Ake* should be applied retroactively, I would hold that the Constitution requires only that the defendant have *access* to a *competent* psychiatrist—not the *effective assistance* of a psychiatrist. Since Clisby made no showing that the psychiatrist to whom he had access was not competent, I would vacate the district court's grant of relief on the *Ake* claim.

The psychiatrist in this case was court-appointed. A court-appointed psychiatrist should be competent. If he is competent, then the inquiry ends. The fact that the assistance afforded by a court-appointed psychiatrist may be ineffective does not implicate constitutional concerns unless the State has in some way caused his assistance to be ineffective.

Clisby argues on appeal that he did not have access to effective psychiatric assistance. He thus attempts to cast his claim in terms of *access*, however, he really is attacking only the effectiveness of that assistance. Clisby does not argue that Dr. Callahan, the psychiatrist appointed at his request, was unqualified or incompetent. The district court did not find that Dr. Callahan was unqualified or incompetent, but rather that "... the *examination* by Dr. Callahan and the *testimony* he presented were inadequate to meet the requirements of *Ake*...."

I do not understand *Ake* to require the appointment of a psychiatrist who renders *effective* assistance. *Ake* speaks in terms of access to "competent psychiatric assistance." 470 U.S. at 77, 105 S.Ct. at 1093. It is *access* to an expert witness that is mandated; *Ake* says nothing about effective assistance by that expert witness. This circuit has not addressed the issue. I would hold that a defendant is entitled to a competent psychiatrist, that is, a qualified psychiatrist rather than the effective assistance of a psychiatrist. *See Waye v. Murray*, 884 F.2d 765 (4th Cir.1989). To reiterate, Clisby does not contend that he did not have access to a competent expert. If he were to make that argument, it would fail for lack of evidence in the record to support it. I would vacate the district court's grant of relief for this reason.

Jimmie BURDEN, Jr., Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

No. 88-8619

United States Court of Appeals, Eleventh Circuit.

May 29, 1990.

Habeas petition was filed. The United States District Court for the Middle District of Georgia, 690 F.Supp. 1040, denied petition. Petitioner appealed. The Court of Appeals, 871 F.2d 956, remanded. The District Court, No. CIV-88-6-3-MAC, Wilbur D. Owens, Jr., Chief Judge, denied petition. Petitioner appealed. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) petitioner was not denied effective assistance of counsel in state murder trial; (2) prosecutor's comments in closing argument at sentencing phase of state capital murder trial were not improper; and (3) jury instruction at penalty phase was adequate.

Affirmed.

1. Criminal Law ⇐641.5

Sixth Amendment right to effective assistance of counsel entails right to representation unimpaired by actual conflict of interest on part of defense counsel. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(1)

When analyzing ineffective assistance of counsel claim, Court of Appeals first asks whether counsel's performance, measured by professional norms prevailing at time, was deficient and, if so, whether deficient performance prejudiced defendant. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.5(3, 4)

In evaluating claim of ineffective assistance of counsel based on actual conflict of interest on part of defense counsel, inquiry is abbreviated and prejudice is presumed if—but only if—defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected lawyer's performance. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.5(3, 7)

Defense counsel's multiple representation of defendants does not necessarily result in ineffective assistance of counsel based on actual conflict of interest; where defendant has not objected to counsel's representation of another, defendant still must show actual conflict and address effect of that conflict. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.5(6)

Public defender's representation of defendant and his nephew, who were being investigated for same murders, did not result in conflict of interest which rendered representation ineffective where public defender, while representing defendant, did not call nephew to stand at nephew's committal hearing and did not elicit testimony prejudicial to defendant; rather, charges against nephew were eventually dropped and potential conflict of interest never became actual. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.5(6)

Evidence did not support defendant's claim that his nephew, who was being investigated with defendant for murder, received grant of transactional immunity negotiated by public defender, who was representing both defendant and nephew, in exchange for nephew's testimony against defendant and, therefore, public defender's representation of both defendant and nephew did not result in conflict of interest which rendered counsel ineffective; impression of nephew that he would not be prosecuted as long as he testified did not establish grant of either formal or informal immunity. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.5(6)

There was no actual conflict of interest which rendered public defender ineffective when public defender representing defendant interviewed defendant's nephew, who was being investigated for same murder and who was represented by another public defender, where defendant's counsel did not represent nephew before or after departure of other public defender from office. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.13(1)

Standard for measuring deficient performance of defense counsel is an objective one: reasonableness under prevailing professional norms. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐1144.10

Reviewing court's scrutiny of defense counsel's performance should be highly deferential. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(4)

Inexperience of defense counsel does not constitute ineffectiveness per se: defendant who relies on allegations of counsel's inexperience in support of ineffective assistance of counsel claim must still make two-part showing of deficient performance and prejudice. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(6)

Fact that defense counsel did not interview all persons now suggested as potential witnesses did not mean that his investigation of murder was inadequate; defense counsel interviewed all of state's witnesses that he could locate, and it was evident that due to eight-year time lapse, faulty memories of those interviewed, and defendant's own inability to remember his whereabouts on day of murders, no alibi witnesses could be found by further investigation. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(2)

Defense counsel's decision not to emphasize murder defendant's background because it was so similar to that of many persons in the area was a tactical decision and did not show that defense counsel was

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unaware of background information and did not establish ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(7)

Defense counsel's failure to present sympathetic character witnesses was not ineffective assistance of counsel; defense counsel decided at guilt phase of capital murder trial not to call character witnesses for fear that state would counter by presenting evidence of defendant's prior convictions, defense counsel chose at sentencing phase not to mention defendant's good behavior in prison because of risk that introduction of prison records would do more harm than good and, although defense counsel considered calling defendant's mother and sisters to present mitigating evidence at sentencing phase, he decided against the tactic on the basis that mother would not have a presentable witness and defendant had just been convicted of burglarizing home of one sister. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(2)

Defendant failed to demonstrate that professional standards prevailing at time of his capital murder trial required defense counsel to challenge composition of jury pool and, accordingly, defendant failed to show ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

15. Habeas Corpus ⇐489

For state court evidentiary ruling to merit federal habeas corpus relief, ruling must have deprived petitioner of fundamental fairness, thereby depriving him due process of law. U.S.C.A. Const.Amends. 5, 14.

16. Constitutional Law ⇐266(4)
Criminal Law ⇐371(4, 12), 372(4)

Georgia state court ruling that extrinsic acts evidence, six or seven years after murder for which defendant was on trial, defendant violently assaulted two women when they refused to have intercourse with him and that defendant had been drinking heavily on those occasions, was admissible in murder prosecution did not render defendant's trial fundamentally unfair and did not deny him due process; there was rational connection between extrinsic acts evidence and murder which occurred after defendant had been drinking, after defendant had been kissing and hugging victim, and after defendant stated that victim had not been "acting right." U.S.C.A. Const. Amends. 5, 14.

17. Habeas Corpus ⇐497

Proper prosecutorial argument, no matter how prejudicial or persuasive, can never be unconstitutional, and even improper statements will not warrant habeas relief unless they render sentencing proceeding fundamentally unfair.

18. Criminal Law ⇐713, 723(1)

Prosecutor's reference in closing argument at sentencing phase of state capital murder trial to widespread publicity and community anger was not improper inasmuch as reference to widespread publicity was to a matter in evidence, and although there was no record evidence regarding community feeling, jurors were members of community and would know what community reaction to murders was.

19. Criminal Law ⇐723(5)

Prosecutor's reference in closing argument at sentencing phase of state capital murder trial to race of victims was not improper; race of victims was a matter of record evidence, record disclosed that prosecutor was arguing the absence of mitigating circumstances, and statement was an appeal to jury not to let itself be swayed by race of victims rather than an impermissible appeal to jury's sympathy for victims on account of their race.

20. Criminal Law ⇐723(1)

Prosecutor's statement in closing argument at sentencing phase of state capital murder trial referring to strength and courage of Americans, including those who had gone to war, in standing up to "forces of evil" was not improper; speech focused on deterrence which was legitimate justification for death penalty.

21. Constitutional Law ⇐266(7)

To satisfy constitutional requirement of due process in criminal trial, state must prove beyond a reasonable doubt every fact

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that constitutes essential element of crime charged against defendant. U.S.C.A. Const.Amends. 5, 14.

22. Criminal Law ⇐1159.2(7)

When considering sufficiency of evidence on review, proper inquiry is not whether reviewing court itself believes that evidence established guilt beyond a reasonable doubt but whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt.

23. Homicide ⇐250

Evidence was sufficient to sustain conviction for malice murder with respect to each victim; one victim died of multiple blows to head while two victims were drowned and one died from strangulation, there was evidence of struggle and according to testimony of defendant's nephew, the nephew had driven defendant who had been drinking heavily and victims to pond and left them there, and when he returned two hours later and found defendant alone, defendant replied that he hit one victim on head and that he knew where other victims were as well. O.C.G.A. § 16-5-1.

24. Homicide ⇐311

Jury instruction at penalty phase of state capital murder trial was adequate; charge fully apprised any reasonable juror of function of aggravating and mitigating circumstances, jury's role in evaluating mitigating circumstances, and its option to recommend against death penalty.

25. Homicide ⇐354(2), 358(1)

Constitution permits jury in murder prosecution to impose sentence of life imprisonment, even in the face of aggravating circumstances, and requires jury to consider any evidence in mitigation. U.S.C.A. Const.Amends. 8, 14.

Millard Farmer, Joseph M. Nursey, Atlanta, Ga., for petitioner-appellant.

Paula K. Smith, Office of the Atty. Gen., Mary Beth Westmoreland, Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, Chief Judge, FAY and VANCE*, Circuit Judges.

TJOFLAT, Chief Judge:

Petitioner, Jimmie Burden, Jr., is a Georgia prisoner convicted on four counts of murder and sentenced to death on three of those counts. After exhausting his remedies in the Georgia state courts, Burden filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, alleging *inter alia* that his trial counsel had a conflict of interest. The district court denied the petition, *see Burden v. Zant*, 690 F.Supp. 1040 (M.D.Ga.1988), and Burden appealed. Because the record did not permit this court to evaluate Burden's conflict of interest claim, we remanded the case for an evidentiary hearing on that issue alone. *See Burden v. Zant*, 871 F.2d 956 (11th Cir.1989). The district court held the evidentiary hearing, made factual findings, and again concluded that Burden had received representation of counsel untainted by conflict of interest. After considering all of Burden's claims, we affirm the district court's denial of Burden's petition for a writ of habeas corpus.

I.

On May 29, 1980, Burden was indicted in Washington County, Georgia, on a charge of burglarizing the home of his sister, Willie Kate Dixon. Burden was arrested on the burglary indictment on August 1, 1981, in Harrington, Delaware. He waived extradition proceedings, and on August 3, 1981, he was returned to Washington County where he was incarcerated pending trial on the burglary charge. He was convicted on that charge in December 1981.

* Judge Robert S. Vance was a member of the panel that heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. *See* 28 U.S.C. § 46(d).

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On September 15, 1981, while Burden was awaiting trial on the burglary charge, his nephew, Henry Lee Dixon, gave a statement to the police implicating Burden in the unsolved 1974 murders of Louise Wynn and her three children. Based upon this statement, the state secured warrants charging both Dixon and Burden with the four murders. No indictment was ever returned against Dixon, however: at Dixon's preliminary hearing, the judge ruled that, while the state had sufficient evidence to hold Dixon as a material witness against Burden, it did not have probable cause to hold him for murder; the state never renewed the murder charges. An indictment was returned against Burden on December 7, 1981, charging him with four counts of malice murder. In March 1982, a Georgia jury found him guilty on each count, and after finding that a statutory aggravating circumstance existed, recommended that he be sentenced to death for each murder.[1] On direct appeal, the Georgia Supreme Court affirmed the four murder convictions and three of the death sentences but set aside one death sentence because the conviction for which that sentence was imposed was used as an aggravating circumstance to support the other three sentences. *See Burden v. State*, 250 Ga. 313, 297 S.E.2d 242, 245 (1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1803, 76 L.Ed.2d 367 (1983).

The district court adopted the Georgia Supreme Court's summary of the facts leading to Burden's conviction, and we reproduce that summary as follows:

> On the evening of August 15 and morning of August 16, 1974, four bodies were recovered from Smith's Pond in Washington County, identified as Louise Wynn and her three children, ages 2, 3, and 4. The autopsies revealed that Louise Wynn died from multiple blows to the head; that Marvin, age 4, and James, age 2, died from drowning; and that Melinda, age 3, died from strangulation. Louise was clothed only in an undergarment and a dress torn in half. The crime scene revealed an area of disturbed pine straw, possibly evidencing a struggle. Investigators also discovered there an automobile lug wrench with what appeared to be blood stains.
>
> After extensive investigation, law enforcement officials were unable to fix upon a suspect, and the case was placed in the unsolved file some two years later. In late 1981, Henry Lee Dixon, a nephew of Burden, came forward with information leading to the arrest and indictment of this defendant.
>
> ....
>
> Henry Lee Dixon testified that on August 13, 1974, Burden came to his house and asked to ride to town with him. He then directed Dixon to a liquor store where Burden purchased a case of beer and some liquor. Burden next directed Dixon to drive to Louise Wynn's house. Burden, who had been drinking heavily all the while, went into the house, and after about 15 minutes returned with two older children, followed by Louise Wynn, who was carrying a baby. Burden told Dixon to drive, while he continued to drink, kissing and hugging Louise Wynn in the back seat. Dixon was then directed to stop along a dirt road leading to Smith's Pond, where Burden and the four victims got out of the car. Burden took from his car a shotgun, fishing poles and bait, and told Dixon to return later to pick them up. When Dixon returned he saw Burden walking down the road, he stopped and asked where the others were. Burden first said that Louise became angry and had gone to her mother's house. After Dixon wanted to go and get Louise Wynn, Burden said "he had [messed] up," that she "didn't act right" and he "hit her side the head with something" and that "she fell in the pond or he throwed her in the pond one." Dixon then asked about the children and Burden replied, "I reckon I damn well know where they are at, too." When Dixon suggested going back to the pond, Burden threatened him with a shotgun if he ever related the event to anyone.

1. Under Georgia law, the jury's sentencing recommendation is binding on the trial court, which actually sentences the defendant. *See* Ga.Code Ann. § 17-10-31 (1982).

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> The day after the bodies were discovered, Burden broke a pool cue over Dixon's head when he saw him talking with others, and again warned him not to mention the events of Tuesday.
>
> Several witnesses testified that Burden and Louise Wynn were keeping social company with each other, having seen them together at various places just prior to Louise Wynn's death.
>
> Two other witnesses testified as to physical assaults and attempted sexual assaults made upon them by Burden at times when he had been drinking. One such witness attributed to Burden the threat: "[H]e told me that he was going to throw me in a pond like he did somebody else."

Burden v. State, 297 S.E.2d at 243-44.

In his petition for a writ of habeas corpus, Burden presents the following claims for relief: (1) due to his counsel's conflict of interest, he did not receive effective assistance of counsel, as guaranteed by the sixth, eighth, and fourteenth amendments to the United States Constitution; (2) the state trial court erred in admitting evidence of unrelated bad acts in violation of rights guaranteed by the sixth, eighth, and fourteenth amendments; (3) his trial counsel's failure to provide effective assistance violated his sixth, eighth, and fourteenth amendment rights; (4) prosecutorial misconduct rendered his trial fundamentally unfair and violated his sixth, eighth, and fourteenth amendment rights; (5) the evidence was not sufficient to support the verdict, in violation of his sixth, eighth, and fourteenth amendment rights; (6) the state trial court erred in giving an inadequate jury instruction on mitigating circumstances which violated his sixth, eighth, and fourteenth amendment rights; and (7) underrepresentation of blacks and women in the grand and traverse jury pools, from which his grand jury and petit jury were drawn, violated his sixth, eighth, and fourteenth amendment rights. Because Burden's first, third, and sixth claims involve the sixth amendment right to effective assistance of counsel, we consider them together.[2] We discuss the remaining claims separately.

II. Effective Assistance of Counsel

A.

Burden contends first that he has been denied the effective assistance of counsel because his counsel labored under a conflict of interest. He bases that contention on the allegedly simultaneous representa-

2. Burden brought the jury-composition claim for the first time in his state habeas action. Because Georgia law requires a criminal defendant to raise a challenge to jury lists at the time the jury is "put upon him," *see Young v. State*, 232 Ga. 285, 286, 206 S.E.2d 439, 442 (1974), and because Burden failed to show cause (and prejudice) so as to excuse the default, *see* Ga. Code Ann. § 9-14-42(b) (1982), the state habeas court ruled that the claim was procedurally defaulted. The court stated that Burden's allegation that his counsel was ineffective for failing to bring a jury-composition challenge was the only contention that might have satisfied the "cause" requirement and that the issue had already been decided against Burden.

Both in his petition to the district court below and in his appellate brief to this court, Burden repeated his jury-composition claim verbatim in his introductory statement of issues. He did not challenge the state court's ruling that the claim was procedurally defaulted, however, and his argument referred both the district court and this court to his ineffective-assistance-of-counsel claim for discussion of the allegedly unconstitutional jury composition.

Under federal habeas law, "[b]efore we can hear the merits of his jury composition challenge ..., [Burden] must show cause for his failure to raise the challenge before the trial court and actual prejudice from that failure." *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc) (citing *Francis v. Henderson*, 425 U.S. 536, 542, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976)), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984); *see also Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). As in *Birt*, *Burden* "has presented only one arguably meritorious contention to satisfy the cause element of the *Francis v. Henderson* analysis; that is, that his trial counsel failed to investigate properly and timely challenge the [grand or] traverse jury composition and therefore rendered ineffective assistance of counsel." *Birt*, 725 F.2d at 597. Thus, Burden's contention that the jury pools were unconstitutionally composed collapses into his contention that his counsel rendered ineffective assistance by failing to bring a jury-composition challenge at the proper time. *See Lancaster v. Newsome*, 880 F.2d 362, 375-76 (11th Cir.1989); *Birt*, 725 F.2d at 597.

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tion of Burden and Henry Dixon by the public defender's office in general and by Burden's trial counsel in particular. When the case first came to this court, it became evident at oral argument that the record provided no answers to critical questions upon which the parties' arguments depended. For example, in his brief and at oral argument, Burden relied heavily on the assumption that his attorney, the public defender who was then representing both Burden and Dixon on the same murder charges, put Dixon on the stand at Dixon's committal hearing[3] and elicited testimony inculpating Burden. Burden also relied on the assumption that his attorney had negotiated and obtained transactional immunity for Dixon in exchange for Dixon's testimony against Burden. Furthermore, the practices of the two-person Public Defender's Office at the time of Burden's representation and the relationship of each attorney to Burden and to Dixon were not clear. The facts have now been sufficiently developed, both at the evidentiary hearing on remand and by supplementary filings, to permit us to resolve Burden's conflict-of-interest contention. After reviewing the elements of an ineffective-assistance-of-counsel claim based on conflict of interest, we set out those facts in some detail.

1.

[1-4] The sixth amendment right to the effective assistance of counsel entails the right to representation unimpaired by actual conflict of interest on the part of defense counsel. *See Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980); *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988). When analyzing an ineffective-assistance-of-counsel claim, we first ask whether counsel's performance, measured by professional norms prevailing at the time, was deficient and, if so, whether the deficient performance prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In evaluating such a claim based on an alleged conflict of interest, however, the inquiry is abbreviated and prejudice is presumed if—but only if—"the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067 (quoting *Cuyler*, 446 U.S. at 350, 348, 100 S.Ct. at 1719, 1718); *see Burger v. Kemp*, 483 U.S. 776, 783, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987). We note that multiple representation does not necessarily result in a constitutional violation: where the defendant has not objected to his counsel's representation of another, he must still show an actual conflict and the adverse effect of that conflict.

2.

[5] We now turn to the facts relevant to Burden's conflict-of-interest contention. Washington County is one of five counties that make up the Middle Judicial Circuit of Georgia. At the time Burden was returned to Washington County to face the burglary charge, indigent defendants in the circuit were represented by a public defender, Kenneth Kondritzer, and an assistant public defender, Michael Moses. Their representation of an indigent defendant would at times begin after a routine visit to the county jails to see if anyone there needed counsel; at other times, the judges would informally appoint the public defender's office to represent an indigent defendant at arraignment. Apparently the judges did not enter formal orders and did not designate either Kondritzer or Moses to represent particular defendants. Rather, Kondritzer and Moses divided the cases between them largely on a geographical basis, with Kondritzer taking the majority of cases in the northern part of the circuit, where Washington County is located, and Moses taking those in the southern part. Although the two attorneys shared an office and a secretary, they handled their cases independently of one another.

3. Under Georgia law, an accused being held in custody prior to indictment may demand a preliminary hearing, often termed a "committal hearing," for the purpose of determining whether there exists probable cause to believe that the accused committed the charged crime and, if so, whether the accused should be detained until a grand jury considers his case. *See* Ga.Code Ann. § 17-7-23(a) (1982); *First Nat'l Bank & Trust Co. v. State*, 137 Ga.App. 760, 224 S.E.2d 866, *aff'd*, 237 Ga. 112, 227 S.E.2d 20 (1976); *see also Fleming v. Kemp*, 748 F.2d 1435, 1439 n. 14 (11th Cir.1984), *cert. denied*, 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed.2d 593 (1986).

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Kondritzer was appointed on or about August 3, 1981, to represent Burden on the burglary charge.[4] On September 15, 1981, the criminal warrants charging Burden with the Wynn murders were issued, and Burden was indicted on those charges on December 7, 1981, one day before his conviction for burglary. The criminal warrants charging Dixon with the same murders were also issued on or about September 15, 1981, and Kondritzer undertook Dixon's representation on or about the same date. Kondritzer testified at the evidentiary hearing in the district court that he could not remember how his representation of Dixon began. There is no doubt, however, that for some period of time Kondritzer himself was representing both Burden and Dixon. Whether Burden was aware at that time that Kondritzer was representing Dixon is unclear; it is clear, however, that he did not request the trial court or Kondritzer himself to put an end to the dual representation.

A committal hearing for Dixon was held on November 19, 1981 in Washington County. The committal hearing transcript, which evidently became available after the case was argued before us but before the district court's evidentiary hearing on remand, reveals that Dixon was incarcerated at the time in a different county and that Kondritzer waived his presence. The only witness at the hearing was Chief Deputy Sheriff Mack Rogers, to whom Dixon had made the statement inculpating Burden in the Wynn murders. The judge determined that there was not probable cause to hold Dixon for murder but offered to hold him as a material witness. The State made a verbal motion to that effect, and the judge granted the motion and set bond at $50,000. Dixon did not post bond and remained in custody until the close of Burden's trial.

Had the facts been as Burden originally presented them to us, we would have had no difficulty concluding that Kondritzer's representation of Dixon had required him to sacrifice Burden, reflecting an actual conflict and adversely affecting his representation of Burden. It is now apparent, however, that this serious allegation is factually incorrect: Kondritzer, while representing Burden, did not call Dixon to the stand and elicit testimony manifestly prejudicial to Burden. Kondritzer's representation of Dixon at Dixon's committal hearing consisted of brief cross-examination that in no way damaged Burden, argument that there was no probable cause to hold Dixon, and opposition to the material witness bond set to ensure Dixon's presence—*and testimony prejudicial to Burden*—at Burden's trial. Thus, while there was a potential conflict of interest—which no doubt would have materialized had Kondritzer *continued* to represent both Burden and Dixon—all charges against Dixon were dropped, and the conflict never became actual in the sense that Kondritzer's representation of Dixon's interests required him to compromise Burden's interests. *See Stevenson v. Newsome*, 774 F.2d 1558, 1562 (11th Cir. 1985), *cert. denied*, 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986).

[6] Similarly, the assumption that Dixon received a grant of transactional immunity, negotiated by Kondritzer and the prosecutor in exchange for Dixon's testimony against Burden, is without factual support. The source of Burden's impression that Dixon was granted immunity appears to have been Dixon's testimony at Burden's

4. The trial judge prepared a post-trial report, in keeping with Georgia's Unified Appeal Procedure established to protect a defendant's rights, reduce the possibility of error, and eliminate superfluous issues in death penalty cases, *see* Ga.Code Ann. § 17-10-36. The report indicated that Kondritzer began representing Burden on the *murder* charges on August 3, 1981, the date of Burden's return to Washington County under indictment for burglary. It is apparent that the trial judge confused the two unrelated cases: Burden was not then a suspect in the Wynn cases; he was not charged with the murders until September 15, 1981 and was not indicted on the murder charges until December 7, 1981.

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trial: under cross-examination, Dixon stated that two deputy sheriffs, interrogating him on the Wynn murders, had promised that he would not be prosecuted if he testified truthfully against Burden; Dixon stated that he understood, from these promises, that he had "immunity."[5] But according to then Chief Assistant District Attorney Richard Malone, who prosecuted Burden, transactional immunity, if and when granted to a witness, was the result of a formal, signed agreement between the district attorney, the witness, and the witness's attorney. There is no documentary evidence of any sort that attests to Dixon's having received immunity, and Malone testified at the district court evidentiary hearing that he did not recall any such agreement concerning Dixon. Furthermore, Malone remembered no negotiations with Kondritzer (or any other attorney) concerning immunity for Dixon. Kondritzer testified at the district court evidentiary hearing that, after the committal hearing, he had informal discussions with Malone, which Kondritzer remembered as resulting in his "understanding" that the State was not "really intereated in prosecuting Dixon" in connection with the Wynn deaths as long as Dixon testified against Burden. The impression of a witness that he would not be prosecuted as long as he testified does not establish a grant of immunity—formal or informal. And informal discussion that results in a defense attorney's understanding of the prosecution's current intentions is not negotiation of immunity. As the district court concluded, "there is [no] evidence of transactional immunity being granted to Henry Lee Dixon"; additionally, there is no evidence of any negotiations concerning immunity. Thus, Burden can no longer base his conflict-of-interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another.

[7] Burden further alleges, with respect to his conflict-of-interest claim, that his trial counsel, Moses, continued actively to represent Dixon while Dixon was being held as a material witness for the prosecution; he also argues that, even if Moses never actively represented Dixon, Kondritzer's representation of Dixon must be imputed to Moses as a member of the same public defender's office. We assume without deciding that two attorneys in the same public defender's office may be considered one attorney, *see Burger*, 483 U.S. at 783, 107 S.Ct. at 3120, and nonetheless perceive no actual conflict of interest adversely affecting Moses' performance.

The record developed at the evidentiary hearing indicates that Koodritzer, who represented Dixon while the murder charges were pending against him, resigned from the public defender's office in late December 1981, after Burden's burglary conviction and before his arraignment on the murder charges; we have already concluded that the potential conflict of interest lurking in Kondritzer's continued representation of Dixon and Burden on the same murder charges never materialized because the charges against Dixon were dropped. During the time that both attorneys were still in the public defender's office, Kondritzer and Moses did not jointly participate in either the Burden or the Dixon case. The district court found that up to the point of Kondritzer's departure "Mr. Moses had not represented petitioner as to either his burglary charge or his murder charges; neither had Mr. Moses assisted Mr. Kondritzer in any way in his representation of petitioner. Mr. Moses also had not represented nor assisted Mr. Kondritzer in representing Henry Lee Dixon." Nothing in the record causes us to question those findings.

Upon Kondritzer's departure, Moses became public defender and took over Burden's defense, a defense that required Moses to attack Dixon's testimony. The district court found that, in the course of preparing for Burden's murder trial, Moses interviewed Dixon—who was being held in county jail under the material witness bond—for the first time. Then, at trial, Moses vigorously cross-examined Dixon, based in part on that interview. At the conclusion of Dixon's testimony, Moses opposed the prosecutor's motion that the material witness warrant against Dixon be dissolved. Moses' conduct is consistent with his recollection, expressed in testimony at the evidentiary hearing in the district court, that he did not represent Dixon in any way. In holding that Moses did not labor under an actual conflict of interest, the district court implicitly found that Moses himself did not represent Dixon before *or after* Kondritzer's departure. There is nothing in the record to suggest the contrary.

Assuming that Kondritzer's past representation of Dixon is imputed to Moses, a conflict of interest arose, for "[a]n attorney who cross-examines a former client inherently encounters divided loyalties." *Lightbourne*, 829 F.2d at 1023. Given Moses' conduct, however, even if a conflict of interest arose from his representation of a client previously represented by the same public defender's office, *see id.* at 1024, we perceive no adverse effect upon his representation of Burden. The district court found that

> Mr. Moses brought out evidence of Dixon's bad character; he inquired into the fact that Mr. Dixon had once been charged with the same crimes alleged against Mr. Burden, and [Dixon's understanding] that as a result of his testimony he was not going to be prosecuted; he cross-examined Mr. Dixon about being in custody under a material witness bond; he brought out prior inconsistent statements made by Mr. Dixon; and he generally attempted to discredit Dixon's testimony.

Like the district court, we perceive no issues that were not brought out by Moses that another attorney might have developed. Accordingly, we reject Burden's contention that Moses' presumed conflict of interest, based on Kondritzer's previous representation of Dixon, adversely affected Moses' representation of Burden.

Because Burden has demonstrated no actual conflict of interest adversely affecting counsel's performance, we hold that no such conflict deprived him of the effective assistance of counsel.

B.

Burden also contends that he did not receive effective assistance of counsel because Moses was inexperienced, overworked, did not sufficiently investigate the case, did not present mitigating evidence at sentencing, and did not challenge the composition of the grand and traverse jury pools.

[8, 9] Under the familiar two-part inquiry into ineffective-assistance-of-counsel claims, we first ask whether counsel's performance was deficient. *See Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. If so, we then determine whether the deficient performance prejudiced the defendant. *Id.*, 104 S.Ct. at 2064. The standard for measuring deficient performance is an objective one: "reasonableness under prevailing professional norms." *Id.* at 688, 104 S.Ct. at 2065. Furthermore, a reviewing court's scrutiny of counsel's performance should be highly deferential. *Id.* at 689–90, 104 S.Ct. at 2065–66 (there is "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; defendant must overcome presumption that challenged action "might be considered sound trial strategy").

[10] We note first that inexperience does not constitute ineffectiveness per se: a defendant who relies on allegations of counsel's inexperience in support of an ineffective-assistance-of-counsel claim must still make the two-part showing of deficient performance and prejudice. *See United States v. Cronic*, 466 U.S. 648, 665, 104 S.Ct. 2039, 2050, 80 L.Ed.2d 657 (1984). After reviewing Moses' performance as Burden's attorney, we conclude that his representation of Burden did not fall below the objective standard of reasonableness articulated in *Strickland*.

[11, 12] Moses testified at the state habeas court's evidentiary hearing that he had adequate time to investigate Burden's case and to prepare his defense. That Moses did not interview all of the persons now

5. Dixon also stated that he did not really know what immunity meant.

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suggested as potential witnesses does not mean that his investigation was inadequate. Moses interviewed all of the state's witnesses that he could locate, the original investigating agents of the Georgia Bureau of Investigation and of Washington County, at least one of Burden's former employers, friends of Louise Wynn, and members of Burden's family, including his mother, grandmother, sisters, and a nephew. It was evident by then—due to the eight-year time lapse, faulty memories of those interviewed, and Burden's own inability to remember his whereabouts on the day of the murders—that no alibi witnesses could be found by further investigation. In the course of his investigation, Moses visited the home of Burden's grandmother several times. Contrary to Burden's assertion, Moses' investigation provided him with considerable information about Burden's upbringing and lack of education. Moses did not fail to present such evidence at the sentencing hearing because he was unaware of it; rather, according to Moses' testimony at the district court evidentiary hearing, he made a tactical decision not to emphasize Burden's background because it was so similar to that of many persons in the area.

[13] Burden also complains that Moses failed to present sympathetic character witnesses. At the guilt phase of the trial, Moses decided to call no character witnesses for fear that the State would counter by presenting evidence of Burden's prior convictions. At the sentencing phase, he chose not to mention Burden's good behavior in prison because of the risk that introduction of prison records would do more harm than good. Although he considered calling Burden's mother and sisters to present mitigating evidence at the sentencing phase, he decided against the tactic. He specifically recalled that Burden's mother would not have made a presentable witness. Further, Burden had just been convicted of burglarizing the home of one sister. Even assuming that the family would have testified sympathetically to Burden (which is not at all certain given the burglary and a violent sexual attack upon his sister, *see infra* part III), damaging information about the burglary conviction could have been revealed to the jury through cross-examination. Surely Moses' decisions with respect to calling witnesses and presenting evidence, based as they were on information gathered through considerable investigation, are the sort of judgment calls that *Strickland* cautions us not to second-guess.

[14] Finally, Burden contends that Moses rendered ineffective assistance by failing to challenge the 1981 Washington County grand and traverse jury pools from which his grand and traverse juries were drawn. As we have previously stated, however, "[t]he sixth amendment right to effective assistance of counsel does not require counsel to raise every objection without regard to its merits." *Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir.), *cert. denied*, 469 U.S. 873, 105 S.Ct. 227, 83 L.Ed.2d 156 (1984). Moses testified at the state habeas corpus hearing that he did not consider a jury-composition challenge feasible at the time: he was familiar with the black-white ratios on the jury pools and considered them to be in line with the black-white ratio of the population at large. Malone, the prosecutor in Burden's case, confirmed this assessment, testifying that, although he had never figured exact percentages, he too remembered that the racial composition of the jury pools in 1981 generally approximated the racial composition of the population.

In support of his assertion that Moses should have challenged the composition of the jury pools, Burden presents an affidavit from Kondritzer stating that perceived discrepancies in the 1983 jury pools had prompted him to bring a challenge. Burden also attaches to his federal habeas petition a 1984 consent agreement, wherein Washington County jury commissioners agreed to revise the jury lists but did not admit discrimination, and a 1983 court order directing the county to revise its jury lists but specifically declining to find that the jury composition was discriminatory. These documents reveal that there were jury-composition disputes in 1983 and suggest, at best, that Moses might have generated a similar dispute in 1981. They do

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not, however, indicate that Moses would have succeeded nor that he made an unreasonable decision when he determined that such a challenge was not feasible. A reviewing court must evaluate counsel's performance based on what counsel knew or should have known at the time rather than on hindsight, *see Strickland*, 466 U.S. at 689–90, 104 S.Ct. at 2065–66. Burden has failed to demonstrate that professional standards prevailing at the time required Moses to challenge the composition of the 1981 jury pool.[6]

In sum, after reviewing Burden's allegations of ineffective assistance of counsel, we agree with the district court that Moses' representation of Burden did not fall below an objective standard of reasonableness.

III. Admission of Extrinsic-Acts Evidence

Burden contends that the trial court erred in admitting into evidence two "bad acts," unrelated to the offenses with which he was charged. The challenged evidence is the testimony of Willie Kate Dixon (Burden's sister) and Betty Jean Darrisaw (who had dated Burden at one time). After a hearing conducted outside the presence of the jury, each witness was allowed to testify that Burden had once violently assaulted her when she refused to have intercourse with him; Burden had been drinking heavily on both occasions. Each incident occurred some six or seven years after the murder of Louise Wynn. Before allowing the testimony of each witness, the trial court instructed the jury to consider it not as direct evidence of Burden's involvement in the Wynn murders but only insofar as it might show "motive or plan or scheme or bent of mind or course of conduct." Burden argues that the incidents were too distant in time and too dissimilar in circumstance to have any relevance with respect to motive, plan, scheme, bent of mind, or course of conduct.

[15, 16] For a state court evidentiary ruling to merit federal habeas corpus relief, the ruling must have deprived the petitioner of fundamental fairness, thereby denying him due process of law. *See Williams v. Kemp*, 846 F.2d 1276, 1281 (11th Cir.1988), *cert. denied*, — U.S. —, 110 S.Ct. 1836, 108 L.Ed.2d 965 (1990); *Jameson v. Wainwright*, 719 F.2d 1125, 1126 (11th Cir.1983), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984). We note preliminarily, that on direct appeal the Georgia Supreme Court expressly ruled that the evidence was relevant under Georgia law and was properly admitted,[7] *see Burden v. State*, 297 S.E.2d at 244, a state-law determination that this court must respect, *see Amadeo v. Kemp*, 816 F.2d 1502, 1504 (11th Cir.1987), *rev'd on other grounds sub nom. Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). Thus, Burden cannot complain that he was deprived of fundamental fairness by the trial court's erroneous application of state law.

The correctness of the ruling under Georgia law does not, of course, preclude this court from granting habeas corpus relief if the ruling was so fundamentally unfair as to deprive Burden of his federal

6. We note, furthermore, that even if we were to assume that a challenge to the composition of the traverse jury pool would have succeeded and would have made more black jurors available to serve at Burden's trial, Burden has not shown that Moses performed deficiently in deciding to proceed to trial without a challenge. Burden's brief to this court cites Moses as testifying that a jury with more black jurors would have been favorable to Burden, who is black himself. We have reviewed Moses' testimony, however, and it is obvious that Moses was making the general point that, given the jury's verdict and death sentence recommendation, *any* change in the actual jury selected could only have benefitted Burden. With respect to black jurors in particular, the prosecutor testified that at the time of the trial there was such great hostility toward Burden in the black community that he, the prosecutor, welcomed the presence of black persons on the jury.

7. After laying out the prerequisites for admitting evidence of independent crimes under state law, the Georgia Supreme Court held that, in Burden's case, "[t]he two transactions were sufficiently similar to show identity, motive, plan, scheme, bent of mind and course of conduct, and the trial court did not err in admitting testimony concerning them." *Burden v. State*, 297 S.E.2d at 244.

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constitutional right to the due process of law. *See Manning v. Rose*, 507 F.2d 889, 892 (6th Cir.1974). We do not, however, consider the admission of the extrinsic-acts evidence a violation of federal due process. We have construed the due process clause as "permitting the states wide latitude in fashioning rules of evidence." *Bassett v. Smith*, 464 F.2d 347, 351 (5th Cir.1972),[8] *cert. denied*, 410 U.S. 991, 93 S.Ct. 1509, 36 L.Ed.2d 190 (1973); *see Lisenba v. California*, 314 U.S. 219, 227, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941) ("Fourteenth Amendment leaves [a state] free to adopt a rule of relevance ..."). In *Lisenba*, where the petitioner claimed that the admission of testimony concerning the drowning of his former wife denied him due process of law in his trial on charges of drowning his later wife, the Supreme Court approved specifically the admission of extrinsic-acts evidence to show motive, plan, scheme, and course of conduct. *Id.*, 62 S.Ct. at 286. Although the extrinsic incident at issue in *Lisenba* did not result in a conviction or even in criminal charges, the Court sustained the state trial court's admission of the evidence because of "the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system." *Id.*, 62 S.Ct. at 286; *see United States v. Beechum*, 582 F.2d 898, 910 (5th Cir.1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

Burden correctly asserts that a state cannot adopt a rule of evidence that permits the introduction into evidence of *any* prior act with some bearing, however tenuous, on proof of motive, plan, scheme, bent of mind, or course of conduct. *See Manning*, 507 F.2d at 894 ("To be consistent with due process, the other crime must be 'rationally connected' with the charged crime."). Burden claims that the extrinsic acts admitted into evidence at his trial were too distant in time and too dissimilar in circumstance to be rationally connected to the Wynn murders. We disagree. Under both federal and Georgia law, a long lapse of time between the extrinsic act and the charged crime does not render the former inadmissible if the acts are sufficiently similar to establish the necessary rational connection. *See United States v. Terebecki*, 692 F.2d 1345, 1349 (11th Cir.1982); *Campbell v. State*, 234 Ga. 130, 214 S.E.2d 656, 658 (1975). In this case, the two witnesses testified that (1) Burden had been drinking heavily, (2) the assaults followed their refusal to have sexual relations with him, and (3) the assaults involved attempted rape. Dixon testified that Burden had been drinking heavily on the day of the Wynn murders and that Burden, who had been kissing and hugging Louise Wynn in the car, said later that Wynn "didn't act right." Louise Wynn's body was clad only in an undergarment and a dress torn in half and was surrounded by evidence of a struggle. There is a sufficient similarity between the Willie Dixon and Darrisaw incidents and the circumstances surrounding Louise Wynn's death to establish a rational connection tending to prove motive, bent of mind, or course of conduct. We therefore hold that the admission of the extrinsic-acts evidence did not render Burden's trial fundamentally unfair and thus did not deny him the due process of law.

IV. Prosecutorial Misconduct

Burden claims that certain statements made by the prosecutor in closing argument at the sentencing phase were so improper as to deprive him of due process. He alleges specifically that (1) in alluding to the widespread publicity and community anger engendered by the Wynn murders, the prosecutor referred to matters not in evidence and improperly attempted to incite the jury; (2) the prosecutor used the race of the victim to support his plea for a death sentence; and (3) the prosecutor made an improper appeal to the patriotism and bravery of the jury.[9]

8. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

9. Burden also complains that the prosecutor misled the jury, with respect to its duty to make a separate and specific finding of a statutory aggravating circumstance, by suggesting that because it had already found Burden guilty of the four murders, it had also found the aggravating circumstance of murder committed while engaged in the commission of another capital offense. We have reviewed the prosecutor's argument and find no such improper suggestion.

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[17] In *Brooks v. Kemp*, 762 F.2d 1383, 1400 (11th Cir.1985) (en banc), *vacated*, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), *reinstated on remand*, 809 F.2d 700 (11th Cir.) (en banc) (per curiam), *cert. denied*, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987), this court articulated the standard for reviewing prosecutorial arguments made at the sentencing phase of a capital trial. *Proper* prosecutorial argument, "no matter how 'prejudicial' or 'persuasive,' can never be unconstitutional," *id.* at 1403, and even improper statements will not warrant habeas relief unless they render the sentencing proceeding fundamentally unfair, *id.* at 1400 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974)); *see Williams*, 846 F.2d at 1283 (when making fundamental unfairness determination, court "ask[s] whether there is a 'reasonable probability' that, but for the prosecutor's offending remarks, the outcome of the sentencing hearing would have been different").

In this case, we do not reach the "fundamental unfairness" inquiry, because the prosecutorial statements challenged by Burden were not improper. We consider each statement in turn.

A. *Reference to Publicity and Community Anger*

[18] Contrary to Burden's assertion, the prosecutor's reference to widespread publicity was to a matter in evidence: Washington County Sheriff J. Euree Curry had testified that the case had been highly publicized. Although there was no record evidence regarding community feeling, the reference to community anger was permissible: the jurors were members of the community and would know what the community reaction was. *See Brooks*, 762 F.2d at 1408 ("Although there was no record evidence on the crime rate, the reference was acceptable because the increase in crime is 'within the common knowledge of all reasonable people.'" (quoting *Tenorio v. United States*, 390 F.2d 96, 99 (9th Cir.) (prosecutorial reference to destruction and waste caused by heroin use acceptable as common knowledge), *cert. denied*, 393 U.S. 874, 89 S.Ct. 169, 21 L.Ed.2d 145 (1968))). Thus we hold that neither reference was improper.

B. *Reference to the Victims' Race*

[19] Burden argues that the prosecutor improperly alluded to the race of the victims to support his request for the death penalty. Burden bases his challenge on the following remarks:

> A young black lady and three black children thrown into a pond. In times past, perhaps that would not have been quite as serious to a lot of people in this county. That's regrettable to have to say. Some people wouldn't have treated that very harshly in times past, and I find that, and I'm sure you do, repugnant.

Not every allusion to the race of the victim is improper, *see Brooks*, 762 F.2d at 1409 (prosecutorial mention of facts about victim, properly developed at trial, acceptable at sentencing; victim need not remain an abstraction). Rather, we must consider the context of the prosecutor's remark. *See id.* In this case, we note first that the race of the victims was a matter of record evidence. Second, the record discloses that the prosecutor was arguing the absence of mitigating circumstances. We agree with the State's assessment of the prosecutor's statement as an appeal to the jury *not to let itself be swayed by the race of the victims* rather than as an impermissible appeal to the jury's sympathy for the victims on account of their race. We hold that the reference to the race of the victims was not improper.

C. *Appeal to the Jury's Patriotism and Bravery*

[20] The prosecutor concluded his argument by reminding the jury of the strength and courage of Americans, including those who had gone to war, in standing up to

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"forces of evil." He urged the jury to do the same by selecting the death penalty and sending the message that Burden's crime would not be tolerated by this society. Burden argues that this statement compares a juror's duty to select the death penalty to a soldier's duty to kill the enemy, a comparison held to be impermissible in *Brooks*. *See id.* at 1412. We cannot agree. Unlike the "war on crime" speech decried in *Brooks* (where the prosecutor implied that the jury, like a soldier under orders to kill, had no choice but to select death), the prosecutor's speech in Burden's case focused on deterrence, which is a legitimate justification for the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 184–87, 96 S.Ct. 2909, 2930–31, 49 L.Ed.2d 859 (1976); *Brooks*, 762 F.2d at 1412 ("Arguments about general or special deterrence may be considered by the jury.").

In sum, we agree with the district court that the challenged prosecutorial statements do not warrant habeas relief.

V. Insufficient Evidence

[21–23] Burden claims that there was insufficient evidence to support his conviction and that his right to due process was therefore violated. To satisfy the constitutional requirement of due process in a criminal trial, the state must prove beyond a reasonable doubt every fact that constitutes an essential element of the crime charged against the defendant. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). When considering the sufficiency of the evidence on review, the proper inquiry is not whether the reviewing court itself believes that the evidence established guilt beyond a reasonable doubt but "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original).

The elements of malice murder, with which Burden was charged, are as follows:

> (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
>
> (b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

Ga.Code Ann. § 16–5–1 (1982).

The following evidence was adduced at Burden's trial. Louise Wynn died of multiple blows to the head. Two of the children were drowned, and one died from strangulation. There was evidence of a struggle. According to the testimony of Henry Dixon, Dixon drove Burden, who had been drinking heavily, and the four victims to a pond and left them there. He returned two hours later and found Burden alone, walking away from the pond. When questioned about the others, Burden replied that he had "f—ed up," had hit Louise Wynn on the head, and that she had fallen in the pond or that he had thrown her in. Burden added that he knew where her children were as well. He warned Dixon not to mention these events, threatening Dixon first with a shotgun, then breaking a pool cue over Dixon's head several days later when he saw Dixon talking to others. Three other witnesses testified that Burden and Louise Wynn had been dating and that they had seen Louise Wynn beaten during that period. Two witnesses testified that they had been violently assaulted by Burden, who was intoxicated on each occasion, after they had refused to have sex with him; one of these witnesses also testified that Burden had threatened her and told her that he would throw her into a pond as he had thrown someone else. Reviewing this evidence in the light most favorable to the prosecution, we are satisfied that it was sufficient to permit a rational trier of fact to find beyond a reasonable doubt, with respect to each victim, all elements constituting the crime of malice murder.

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VI. Improper Jury Instruction

[24] Burden claims that the jury instruction at the penalty phase of his trial failed to guide and focus the jury's consideration of mitigating circumstances, as required by the eighth and fourteenth amendments. Burden relies on *Moore v. Kemp*, 809 F.2d 702, 731 (11th Cir.) (en banc) (eighth and fourteenth amendments require trial court to instruct jury clearly and explicitly on mitigating circumstances and on jury's option to recommend against death penalty), *cert. denied*, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987), and on *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.) (en banc), *cert. denied*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986), where this court considered the adequacy of a jury instruction on mitigating circumstances. We explained in *Peek*, however, that the focus of a reviewing court's inquiry is "whether there is a reasonable possibility that the jury understood the instructions in an unconstitutional manner," *id.* at 1489 (citing *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)), and we held that an instruction on mitigation is constitutionally sufficient "if it is clear from the entire charge considered in context that a reasonable jury could not have misunderstood the nature and function of mitigating circumstances," *id.* at 1494.

[25] The Constitution permits a jury to impose a sentence of life imprisonment even in the face of aggravating circumstances, *see Gregg v. Georgia*, 428 U.S. at 197–98, 96 S.Ct. at 2936–37, and requires a jury to consider *any* evidence in mitigation, *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). After reviewing the entire charge given to the jury at the sentencing phase of Burden's trial, we are satisfied that it would fully apprise any reasonable juror of the function of aggravating and mitigating circumstances, the jury's role in evaluating mitigating circumstances, and its option to recommend against the death penalty.[10] We therefore reject Burden's contention that the instruction was constitutionally inadequate.

VII.

For the foregoing reasons, the district court's denial of the petition for a writ of habeas corpus is

AFFIRMED.

10. The trial court told the jury it was to consider each of the four murders separately, and the court read the statutory aggravating circumstance (*to wit:* defendant committed the murder while engaged in the commission of another capital felony) sought by the State in connection with each murder. The court then informed the jury as follows:

> Now, members of the jury, even if you find beyond a reasonable doubt that the State has proven the existence of the circumstance in each murder, ... you nonetheless are not required to recommend that the accused be put to death for that murder.
>
> You shall consider any mitigating circumstances. Mitigating circumstances are those circumstances which in fairness and mercy shall be considered by you in fixing punishment.
>
> You may, if you see fit, and this is a matter entirely within your discretion, provide for a life sentence for the accused in any or all murders based upon any mitigating circumstance or reason satisfactory to you, or without any reason, if you see fit to do so. You may recommend life imprisonment even though you have found the aggravating circumstance given to you in this charge for each murder to have existed beyond a reasonable doubt.
>
> The sentences to be imposed in these cases are a matter entirely within your discretion. You may provide for life sentences for this accused for any reason that is satisfactory to you or without any reason if you care to do so.... You may find the aggravating circumstance in your opinion is sufficiently substantial to call for the imposition of the death penalty and even so your verdicts may be for a life imprisonment.

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APPENDIX E

September 5, 1990

Order denying rehearing

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-8619

JIMMIE BURDEN, JR.,

Petitioner-Appellant,

versus

WALTER ZANT, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellee.

On Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion May 29, 1990, 11th Cir., 198__, ____F.2d____).

(SEP 5 1990)

Before: TJOFLAT, Chief Judge, FAY and VANCE*, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

*Judge Robert S. Vance was a member of the panel that heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. See 28 U.S.C. § 46(d).

Appendix E

ORD-..

A P P E N D I X F

Trial Judge's Mandatory Post-Trial Report

State v. Burden, Superior Court of Washington County,
State of Georgia

of the

Superior Court of Washington County, Georgia

The State vs. Jimmy Burden, Jr.
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name: Burden (Last) Jimmy (First) Jr. (Middle) 2. Date of Birth 10-[illegible]-41 (No. Day Year)

Social Security Number 254 70 0436
Sex M [ ] F [ ]
5. Marital Status: Never Married [ ]
Married [ ]
Divorced [x]
Spouse Deceased [ ]

Children
(a) Number of children none
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

Father living: Yes [ ] No [x] If deceased, give date of death 1953 or 54
Mother living: Yes [x] No [ ] If deceased, give date of death N/A
Number of children born to parents _____
Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17
(Circle one) [college]

Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [ ]
(IQ above 100) High [ ]

Psychiatric Evaluation Performed: Yes [x] No [ ]
If performed is defendant:
a. Able to distinguish right from wrong? [x] [ ]
b. Able to adhere to the right? [x] [ ]
c. Able to cooperate intelligently in his own defense? [x] [ ]
If examined, were character or behavior disorders found? Yes [ ] No [ ]
(If answer is yes, please elaborate)

Unknown

What other pertinent psychiatric [and psychological] information was revealed?

~~Unknown~~ The defendant was evaluated by Central State Hospital and the report is on file in the Clerk's Office.

Prior work record of defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	Strates Shows (circus)	$175 week	1980-1981	incarcerated
b.	Earl Ivey (logger)	Unknown	1975-	Sentenced to prison
c.	" "		1979-	Own business
d.				
e.				

*A separate report must be submitted for each defendant sentenced to death.

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[redacted] was tried with or without jury.

How did the defendant plead? Guilty [ ] Not guilty [x]

C. Offense Related Data

Capital Offense for Which Penalty Imposed:

a. Treason . . . . . [ ]
b. Murder . . . . . [x]
c. Kidnapping for Ransom . . . . . [ ]
d. Kidnapping where Injury Results . . [ ]
e. Aircraft Hijacking. . . . . [ ]
f. Rape . . . . . [ ]
g. Armed Robbery . . . . . [ ]

Were other offenses tried in the same trial? yes [x] no [ ]

If other offenses were tried in the same trial list those offenses.

a. Murder of Marvin J. Wynn

b. Murder of James Lamar Wynn

c. Murder of Melinda Cleo Wynn

d. Murder of Louise Wynn

If tried with jury, did the jury recommend the death sentence?
Yes [x] No [ ]

Statutory aggravating circumstances found: Yes [x] No [ ]

Which of the following statutory aggravating circumstances were instructed and which were found?

		Instructed	Found
a.	(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or (2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[ ]
b.	(1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery or (2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[x]	[x]
c.	The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

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d.	The offender committed the offense himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e.	The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f.	The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g.	The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[ ]	[ ]
h.	The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i.	The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j.	The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

List nonstatutory aggravating circumstances indicated by the evidence, if any.

a. History of violence toward women(motive, scheme and design)

b. _____

c. _____

d. _____

Was there evidence of mitigating circumstances? Yes [ ] No [x]

If so, which of the following mitigating circumstances was in evidence?

a.	The defendant has no significant history of prior criminal activity.	[ ]
b.	The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.	[ ]
c.	The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.	[ ]
d.	The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.	[ ]
e.	The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.	[ ]

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demination of another person.

i. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other.
Please explain if (i) is checked _____

Defendant was probably in a state of intoxication (x)

_____

If tried with a jury, was the jury instructed to consider mitigating circumstances? Yes [✓] No [ ]
~~Only to consider all mitigating circumstances~~ Wrong

Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [x]

Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [ ] No [x]

Was the victim related by blood or marriage to defendant? Yes [ ] No [x]

If answer is yes, what was the relationship? _____

_____

_____

Was the victim an employer or employee of defendant? No [x]
Employer [ ]
Employee [ ]

Was the victim acquainted with the defendant? No [ ]
This was one of the issues of the trial. Casual Acquaintance [ ] ?
<--- Wrong Friend [ ]

Was the victim local resident or transient in the community? Resident [x]
Transient [ ]

Was the victim the same race as defendant? Yes [x] No [ ]

Was the victim the same sex as the defendant? Yes [ ], No [x]

Was the victim held hostage during the crime? No [x]
Yes - Less than an hour [ ]
Yes - More than an hour [ ]

Was the victim's reputation in the community: Good [ ]
Bad [x]
Unknown [ ]

Was the victim physically harmed or tortured? Yes [x] No [ ]
If yes, state extent of harm or torture: One victim was beat about the head with an object - one child may have been strangled - the two smaller children may not have been physically abused prior to drowning.

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If a weapon was used in commission of the crime was it?
other three victims - No weapon used [x]
Poison [ ]
Motor Vehicle [ ]
Louise Wynn - Blunt Instrument [x]
Sharp Instrument [ ]
Firearm [ ]
Other _____ [ ]

_____

Does the defendant have a record of prior convictions? Yes [x] No [ ]

If answer is yes, list the offenses, the dates of the offenses and the sentences imposed? (See copy of presentence report)

Offense	Date of Offense	Sentence Imposed
a. Burglary	1976	5 years
b. Perjury	1978	7 years probation
c. Burglary	1981	12 years
d.		

Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [x] No [ ]

Was the defendant a local resident or transient in the community?
Resident [x]
Transient [ ]

D. Representation of Defendant *

Date counsel secured August 3, 1981

How was counsel secured? a. Retained by defendant [ ]
b. Appointed by Court [x]

If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [x]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) _____

_____

_____

How many years has counsel practiced law? a. 0 to 5 [x]
b. 5 to 10 [ ]
c. over ten [ ]

What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [ ]
c. Mostly criminal [x]

Did the same counsel serve throughout the trial? Yes [x] No [ ]

If not, explain in detail Public Defender's Office was appointed soon after Defendant's apprehension - Defendant was initially represented by Kenneth Boudreaux of the Public Defender's Office.

(If more than one counsel served answer the above questions as to each counsel and attach to this report.)

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solicitation for the Public Defender's office

E. Original Conviction

Was race affecting the defense as an issue in the trial? Yes [ ] No [x]

Did race otherwise appear as an issue in the trial? Yes [ ] No [x]

What percentage of the population of your county is the same race as the defendant?

a. Under 10% . . . . . [ ]
b. 10 to 25% . . . . . [ ]
c. 25 to 50% . . . . . [ ]
d. 50 to 75% . . . . . [x]
e. 75 to 90% . . . . . [ ]
f. Over 90% . . . . . [ ]

Were members of defendant's race represented on the jury? Yes [x] No [ ]

If not, was there any evidence they were systematically excluded from the jury?
Yes [ ] No [ ]

Was the jury instructed to exclude race as an issue? Yes [ ] No [x]

Was there extensive publicity in the community concerning this case?
Yes [x] No [ ]

Was the jury instructed to disregard such publicity? Yes [x] No [ ]

Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence?
Yes [ ] No [x]

Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence?
Yes [ ] No [x]

If answer is yes, what was that evidence? _____

In your opinion, was the death sentence imposed in this case appropriate?
Yes [X] No [ ]

General comments concerning your answer: SEE ATTACHMENT

F. Chronology of Case

		Elapsed Days
Date of Offense	13 August, 1974	
Date of Arrest	2 August, 1981	
Guilt Trial Began	1 March, 1982	
Guilt/Sentence Imposed	4 March, 1982	

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Date guilt trial was ended on N/A

Date Trial Judge's Report Completed April 29, 1982

*Date received by Supreme Court _____

*Date sentence review completed _____

*Total elapsed days _____

*To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached * See Below
2. He stated he had no comments ( )
3. He has not responded ( )

April 29, 1982
Date

Judge, Superior Court of
Washington County

* The Defendant's Attorney declined. Obtain much of the information contained in this report.

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Question E-12.

The witness most damaging to the defendant's case was Henry Lee Dixon. He is the defendant's nephew. Dixon stated that he carried Burden, his girlfriend and her three children to a point near Smith's Pond. That was the last time the victim and her three victim children were seen alive. Burden allegedly told Dixon that he had killed all four victims. Additionally, two women testified that Burden made sexual advances toward them in a violent way. One woman allegedly assaulted is Willie Kate Dixon, Burden's sister, and Henry Lee Dixon's mother. The other woman, Betty Jean Darrisaw allegedly lived with Burden for several months.

Burden denied knowing the victim and her three small children other than in a very casual way. There were several witnesses who testified that Burden may very well have been Louise Wynn's lover. It was suggested that Louise Wynn may have attempted to terminate their relationship causing Burden's temper outburst resulting in these violent acts. A similar circumstance existed in Burden's relationship with Betty Jean Darrisaw, who was physically abused as mentioned above.

The jury was composed of substantial citizens. Obviously, the jur believed beyond a reasonable doubt that Burden was guilty of killing all four individuals. As noted in this questionnaire the three children victims were 5, 3 and 2 years of age. The evidence did not indicate and it would appear obvious that these children of tender age could not have made a violent attack upon the defendant. Since the jury believed Burden killed all four victims in cold blood it would appear also that they believed the death penalty was warranted.

There were no eye witnesses to the alleged criminal acts. The State's case depended primarily upon the testimony and credibility of Henry Lee Dixon which was corroborated by Burden's potential for violence. The State felt that it was necessary to keep Dixon under a $50,000 material witness bond in order to guarantee his presence at court. This fact was made known to the jury. Also, Dixon was granted immunity from prosecution and the jury was properly informed of this fact and an appropriate charge was given by the court to the jury.

Appendix F, p. 8

ORIGINAL

NO. 90-5796

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JIMMIE BURDEN, JR.,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PAULA K. SMITH
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for Respondent
Assistant
Attorney General

MICHAEL J. BOWERS
Attorney General

SUSAN V. BOLEYN
Senior Assistant
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Please serve:

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to consider an issue regarding the alleged failure of the circuit court to afford a presumption of correctness under 28 U.S.C. § 2254(d) to a state court fact finding when this issue was not properly raised below?

II.

Should this Court grant certiorari to consider a conflict of interest claim where the alleged adverse impact presented to this Court is not the same theory as presented below and where the circuit court properly applied existing precedent to find no Sixth Amendment violation?

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NO. 90-5796

IN THE
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JIMMIE BURDEN, JR.,

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WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Jimmie Burden, Jr., was indicted by the Washington County, Georgia, Grand Jury upon special presentment during the December Term 1981 for the murders of Louise Wynn and her three children, which had occurred on or about August 16, 1974. (Trial Record 9-10). As the state sought the death penalty, the case was tried under Georgia's Unified Appeal

Procedure. Upon a jury trial beginning March 1, 1982, Petitioner was found guilty on all four counts. (Trial Record 10). The jury found the existence of four statutory aggravating circumstances under O.C.G.A. § 17-10-30(b)(2) and sentenced Petitioner to four death sentences. (Trial Record 37-40). On direct appeal, the Supreme Court of Georgia affirmed the four murder convictions and three death sentences; the death sentence for Louise Wynn, however, was set aside as "mutually supporting" the death sentences for the other three murders. Burden v. State, 250 Ga. 313, 297 S.E.2d 242 (1983), cert. den., 460 U.S. 1103, rhng. den., 462 U.S. 1112 (1983).

Pursuant to an outstanding execution date, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgie, on July 13, 1983, and sought a stay of execution and leave to proceed in forma pauperis. The stay of execution as well as pauper's status was granted. Petitioner twice amended the petition. An evidentiary hearing was held on October 24, 1983. A second evidentiary hearing was set for March 1984 by order filed January 13, 1984. In a letter to the court dated March 1, 1984, Petitioner stated he had no additional evidence to present at a hearing, tendered an affidavit, and requested leave to file a brief. Respondent concurred that no additional hearing was necessary but objected to the admission of a affidavit. Briefs were then submitted on behalf of the parties. Petitioner then attempted to amend the

petition, and Respondent opposed any amendment. On June 29, 1984, the state habeas corpus court denied leave to amend because the hearing had been held and the record closed.

On September 6, 1984, the state habeas corpus court entered an order denying relief. Respondent moved for reconsideration of a portion of the order regarding the grand and traverse jury composition issue. On September 24, 1984, the state habeas corpus court granted the motion for reconsideration and vacated that portion of its order previously dealing with the jury composition issue; the court then specifically ruled that the jury issue had been procedurally defaulted under Georgia law due to the lack of timely objection and ruled there had been no showing of cause and actual prejudice. Petitioner then filed a notice of appeal as well as an application for a certificate of probable cause to appeal. The Supreme Court of Georgia denied the application on March 5, 1985. Certiorari was denied. Burden v. Kemp, 474 U.S. 865, 106 S.Ct. 187 (1985).

Petitioner then filed a second petition for writ of habeas corpus in the Butts County Superior Court, raising only the claim that Georgia's death penalty statute was discriminatorily applied against black people and persons accused of killing white people. Respondent moved to dismiss the petition as successive. On February 3, 1987, the state habeas corpus court dismissed this second petition as successive. The Supreme Court of Georgia denied the application for a certificate of

probable cause to appeal on March 11, 1987. The remittitur was made the judgment of the state habeas corpus court on September 9, 1987.

Petitioner then filed an application for federal habeas corpus relief in the United States District Court for the Middle District of Georgia. (R1-4). Pursuant to the show-cause order of the magistrate, Petitioner filed a brief in support of the petition on March 16, 1988. (R1-6). An answer, brief and exhibits were subsequently filed by Respondent. (R1-7, 8, 9). Petitioner filed a reply brief. (R1-10). Respondent then filed a motion and brief to strike previously unsubmitted evidence, consisting of a consent order in an unrelated civil action, as the order had been entered five months before Petitioner's first state petition was denied. (R1-11).

On July 12, 1988, the district court entered an order, denying habeas corpus relief. (R1-13). Judgment was entered in favor of Respondent on that same date. (R1-14).

Petitioner subsequently filed a notice of appeal, a motion for leave to proceed in forma pauperis and an application for a certificate of probable cause. (R1-15, 16, 17). The district court denied probable cause and leave to proceed as a pauper. (R1-18). The Eleventh Circuit Court of Appeals subsequently granted the application for a certificate of probable cause and an appeal followed.

Following the submission of briefs and oral argument before a panel of the Eleventh Circuit, the Court remanded the case for an evidentiary hearing on the sole issue of the alleged conflict of interest claim. Burden v. Zant, 871 F.2d 956 (11th Cir. 1989). Pursuant to the remand, an evidentiary hearing was held in the district court on June 1, 1989. Counsel for the parties thereafter submitted proposed orders to the district court. On September 20, 1989, the district court found that the factual basis underlying the conflict of interest claim lacked merit and that Petitioner had failed to establish that a conflict of interest existed. Petitioner thereafter filed a notice of appeal from the adverse decision.

On May 29, 1990, the panel entered its opinion, affirming the denial of habeas corpus relief as to all grounds. Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990).[1] Petitioner thereafter filed a motion to vacate opinion, permit briefing and oral argument on or about June 8, 1990, as well as file a motion to toll the time for filing a petition for rehearing and suggestion for rehearing en banc. After Respondent filed a response to the motion, the Eleventh Circuit

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[1] Judge Vance had been a member of the panel who heard oral argument but did not participate in the post-remand decision due to his death.

ordered the parties on June 29, 1990, to file letter memoranda on the conflict of interest claim. On July 24, 1990, the Eleventh Circuit denied Petitioner's motion to file a petition for rehearing and suggestion for rehearing en banc out of time. Petitioner then filed a motion for reconsideration of that denial on July 25, 1990. The petition for rehearing was denied on September 5, 1990. Petitioner thereafter filed a motion for stay of the mandate pending application for certiorari, and the Eleventh Circuit denied that motion on September 19, 1990. The mandate of the circuit court issued September 19, 1990, and was made the judgment of the district court on September 20, 1990.

Petitioner has now filed the instant petition for writ of certiorari seeking review of the Eleventh Circuit panel opinion denying habeas corpus relief and in particular the ruling on the conflict of interest issue. Inasmuch as the facts regarding the crimes themselves are not directly implicated by the issues before the Court, Respondent relies upon the statement of facts set forth in the Eleventh Circuit opinion which also incorporates the facts found by the Supreme Court of Georgia on direct appeal. See Burden, 903 F.2d at 1355-57.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO CONSIDER THE ISSUE REGARDING THE ALLEGED FAILURE TO AFFORD A PRESUMPTION OF CORRECTNESS TO A STATE COURT FACT FINDING AS THIS ISSUE WAS NEVER RAISED IN THE DISTRICT COURT AND IMPROPERLY RAISED BELOW.

Petitioner has presented two questions to this Court in the instant petition for writ of certiorari. Initially, Petitioner urges this Court to grant certiorari to consider the alleged failure of the circuit court to afford a presumption of correctness to a state court "factual finding" under 28 U.S.C. § 2254(d). Pretermitting the question of whether this raises a constitutional issue for resolution by this Court, Respondent urges this Court to decline to grant certiorari to consider this question as this issue was never raised before the district court as a factual or legal matter, was given only passing reference by Petitioner in the letter brief which the circuit court requested, and was not raised as a substantive legal issue in the petition for rehearing/suggestion for rehearing en banc.

As noted in the statement of the case above, this case was remanded by the circuit court following oral argument before a panel of that court. Petitioner had never asserted that the state trial judge allegedly made any factual finding in the trial report regarding any alleged grant of immunity to prosecution witness Henry Lee "Acid" Dixon, Petitioner's nephew. In the post-hearing proposed order submitted by Petitioner in the district court, Petitioner never included this as an alleged fact or any basis for decision by the district court. In the letter memorandum of July 9, 1990, which Petitioner submitted in the Eleventh Circuit, Petitioner for the first time claimed that the state trial judge made a factual finding in his post-trial report that Dixon had been granted immunity and that this factual finding was entitled to a presumption of correctness, without citing the code-section or any authority and certainly not raising this as a substantive legal issue. Rather, in the fourteen page letter memorandum, Petitioner asserted two issues: (1) "the district court failed to utilize the appropriate legal standard" and (2) "Jimmy Burden's counsel labored under an actual conflict of interest which adversely effected their performance." (Petitioner's letter memorandum, p. 4, 7). For the first time in the out-of-time petition for rehearing and suggestion for rehearing en banc did Petitioner assert that the district court and circuit court erred in refusing to accept this alleged

state court "fact finding." Respondent submits that Petitioner failed to properly raise this issue below as this alleged underlying "fact" had never been cited nor relied upon by Petitioner until after the panel entered its decision following the remand. Clearly the basis for asserting this had been available to Petitioner in the first appeal of this case and in the remand to the district court. Under these facts, Respondent submits Petitioner failed to raise this issue properly below so that this Court should decline to consider this issue.

II. THE ELEVENTH CIRCUIT PROPERLY FOUND NO CONFLICT OF INTEREST EXISTED.

In the second issue before this Court, Petitioner urges this Court to grant certiorari to consider the propriety of the circuit court opinion finding Petitioner's trial counsel did not labor under an actual conflict of interest and that Petitioner had failed to establish any adverse impact as a result. Petitioner now contends that the trial judge abrogated his alleged duty to inquire sua sponte into Petitioner's representation, a factual and legal theory never raised by Petitioner until his letter memorandum. Petitioner also contends that Henry Dixon allegedly testified upon a grant of immunity from the prosecution secured by one public defender so that this constitutes the alleged adverse impact, but the district court and Eleventh Circuit found to the contrary.

The problem with the conflict of interest issue in this case is that it has been a "chameleon" throughout the history of this litigation. Petitioner was represented by public defender Michael Moses at the 1982 murder trial. In Petitioner's first state habeas corpus petition, paragraphs 11-19, Petitioner contended he received ineffective assistance of counsel from trial counsel Michael J. Moses, because "at the time of the trial, counsel was preparing for his unsuccessful campaign for district attorney in the Middle Judicial Circuit

of Georgia," so that running for this office prejudiced Petitioner. Petitioner filed a second amendment to this petition claiming that the office of the public defender represented both "Petitioner at his trial and the key prosecution witness, Henry Lee Dixon" and that the public defender's office had represented Dixon in connection with the same murder charges upon which Petitioner was convicted. (Second Amendment, para. 60). In the post-hearing brief filed by Petitioner in the state court, Petitioner asserted that the alleged conflict of interest arose when the previous public defender, Kenneth Kondritzer, allegedly requested a preliminary hearing for Dixon but did not request a preliminary hearing for Petitioner. (Post-hearing brier, Respondent's Exhibit No. 2S below, p. 2-3). Petitioner claimed that at Dixon's preliminary hearing, Henry Lee Dixon "gave an exculpatory statement which incriminated Jimmy Burden." Id.

In his federal habeas corpus petition, ground A, paragraphs 10-16, Petitioner asserted that the Office of the Public Defender represented both Petitioner and Henry Lee Dixon at the time of Petitioner's trial so that this constituted a conflict of interest. Petitioner also asserted:

> At the preliminary hearing [Dixon's], Mr. Kondritzer presented testimony of Henry Dixon in which he testified in a manner to exculpate himself while incriminating Jimmy Burden.

(Federal Petition, p. 7, para. 12). This was the form of this claim which was briefed in the Eleventh Circuit following the initial denial of relief by the district court and asserted in the oral argument before the panel of that court. It was this assertion - i.e., that former public defender Kondritzer presented the testimony of Henry Dixon against Petitioner at the state preliminary hearing that was the premise for the remand. Burden, 871 F.2d at 957.

At the federal evidentiary hearing, Respondent introduced a transcript of Dixon's state preliminary hearing which showed that Dixon was not even present at his own state preliminary hearing, much less testify against Petitioner. (Federal Transcript, p. 34-35; District Court Order, p. 4-5).

Following the remand, the Eleventh Circuit found:

> Had the facts been as Burden originally presented them to us, we would have had no difficulty concluding that Kondritzer's representation of Dixon had required him to sacrifice Burden, reflecting an actual conflict and adversely affecting his representation of Burden. It is now apparent, however, that the serious allegation is factually incorrect: Kondritzer, while representing Burden, did not call Dixon

> to the stand and elicit testimony manifestly prejudicial to Burden. Kondritzer's representation of Dixon at Dixon's committal hearing consisted of brief cross-examination [of chief deputy Rogers, the "only witness"] that in no way damaged Burden, argument that there was no probable cause to hold Dixon, and opposition to the material witness bond set to insure Dixon's presence--and testimiony prejudicial to Burden--at Burden's trial. Thus, while there was a potential conflict of interest--which no doubt would have materialized had Kondritzer continued to represent both Burden and Dixon--all charges against Dixon were dropped, and the conflict never became actual in the sense that Kondritzer's representation of Dixon's interest required him to compromise Burden's interests.

Burden, 903 F.2d at 1359. (Emphasis in original).

Petitioner now urges this Court to grant certiorari to consider whether the trial court abrogated its alleged duty to inquire sua sponte into the representation of Petitioner by the

office of the public defender, a legal theory which was not initially raised in the district court on the Eleventh Circuit or presented as a basis for resolution. It was not raised in the district court remand proceeding. The Eleventh Circuit has a rule against deciding issues not raised in the district courts. Stephens v. Zant, 716 F.2d 276 (11th Cir. 1983). Thus, Respondent submits that any question of whether the trial court had a duty to inquire sua sponte into an alleged conflict of interest is not properly before the court.

Petitioner also complains of the finding of the circuit court that Dixon did not testify at trial under any grant of immunity and, as noted above, asserts that the factual findings of the district court and Eleventh Circuit are erroneous because of a statement of the trial judge in the trial report that Dixon allegedly had immunity. Respondent submits that Petitioner simply failed to discharge his duty below to establish that the factual findings of the district court were clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure. Amadeo v. Zant, ___ U.S. ____, 108 S.Ct. 1771 (1988). The district court heard testimony from former public defender Kondritzer, public defender Moses and prosecutor Malone and noted the absence of any documentary evidence establishing that Dixon had in fact been granted immunity. The district court found that after Dixon's preliminary hearing, former public defender Kondritzer had "informal discussions"

with prosecutor Malone about what would ultimately happen to Dixon, that Kondritzer recalled that these discussions resulted in only "an understanding, you know, as long as he testified, nothing would happen to him," and that the practice in that circuit for any grant of transactional immunity was by formal agreement. (District Order, p. 4-5). The circuit court found that neither Kondritzer (who never represented Petitioner on the murder charges) nor Moses secured any formal agreement with the prosecutor for immunity for Dixon so that Petitioner "can no longer base his conflict-of-interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another." Burden, 903 F.2d at 1360.

The Eleventh Circuit also found that public defender Moses, who actually represented Petitioner at the March 1981 murder trial, did not actively represent Dixon while Dixon was being held on material witness bond. Id. Relying upon this Court's decision in Burger v. Kemp, 483 U.S. 776 (1987), the court simply assumed without deciding that two attorneys employed by the same public defender's office could be considered one attorney but found no actual conflict ever manifested itself, much less any adverse impact as a result. Burden, 903 F.2d at 1360-61. The court found that Kondritzer represented Petitioner on unrelated burglary charges and only represented

Dixon on the murder charges until they were dropped, and Kondritzer thereafter left the public defender's office. Id. Before Kondritzer's departure, the two attorneys never jointly participated in either Petitioner's or Dixon's case. Id. Public defender Moses never took any affirmative action to represent Dixon even while Dixon was being held on the material witness bond, interviewed Dixon for the first time in preparation for Petitioner's murder trial and "vigorously cross-examined Dixon" at trial. Id. The court noted that public defender Moses even opposed the state's request that the material witness bond be dissolved after Dixon testified. Id.

Now, in another chameleonic transformation of the conflict of interest claim, Petitioner asserts that it must have been attorney Kondritzer who labored under an actual conflict of interest, although Kondritzer never represented Petitioner on the murder charges as Kondritzer allegedly secured immunity for Dixon. Respondent submits that the Eleventh Circuit properly resolved the issues based upon the existing record and correctly concluded Petitioner failed to establish an actual conflict of interest or any adverse impact as a result. Cuyler v. Sullivan, 446 U.S. 335 (1980); Burger v. Kemp. Respondent further urges this Court to decline to grant certiorari as the decision of the Eleventh Circuit is factually and legally correct.

CONCLUSION

Wherefore, because Petitioner has presented questions to this Court which were not properly raised below and where the decision of the circuit court is demonstrably in accord with decisions of this Court and presents no new question for review, Respondent prays that this Court deny certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PAULA K. SMITH, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day, within the time required for filing, served a true and correct copy of this Brief in Opposition upon counsel for the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

Joseph M. Nursey
Millard C. Farmer
P.O. Box 1978
Atlanta, Georgia 30301

This 19th day of October, 1990.

Paula K. Smith
PAULA K. SMITH
Assistant Attorney General

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 90-5796

Jimmie Burden, Jr. (Petitioner) vs. Walter Zant, Warden (Respondent)

The Clerk will enter my appearance as Counsel of Record for Zant

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Paula K. Smith

(Type or print) Name Paula K. Smith

☐ Mr. ☒ Ms. ☐ Mrs. ☐ Miss

Firm Ga. Dept. of Law

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City & State Atlanta, GA Zip 30334

Phone (404) 656-3351

Rule 9

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

SUPREME COURT OF THE UNITED STATES

JIMMIE BURDEN, JR. *v.* WALTER ZANT, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-5796. Decided February 19, 1991

PER CURIAM.

Petitioner argues that the Court of Appeals, in rejecting his conflict-of-interest claim, improperly failed to give a presumption of correctness to a state-court factual finding, in violation of 28 U. S. C. § 2254(d). We agree, and accordingly the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

On August 1, 1981, petitioner was arrested on a charge of burglarizing his sister's house. Kenneth Kondritzer, a local public defender in a two-attorney public defender's office, was appointed soon thereafter to represent petitioner. While petitioner was awaiting trial on the burglary charge, his nephew, Henry Lee Dixon (the son of the alleged burglary victim), gave a statement to the police implicating petitioner in the unsolved 1974 murders of a woman and her three children. Based upon Dixon's statement, the police obtained warrants on or about September 15, 1981, charging both petitioner and Dixon with the murders. Kondritzer began representing Dixon at about that time, while continuing to represent petitioner. Dixon, however, was never indicted for the murders. At a preliminary hearing on November 19, 1981, in which Kondritzer appeared on Dixon's behalf, the judge ruled that although the State had sufficient evidence to hold Dixon as a material witness against Burden, it did not have sufficient evidence to hold him for the murders.

Petitioner was indicted for the murders on December 7, 1981, while he was still represented by Kondritzer. Kondritzer, however, left the public defender's office at the end of December 1981, and the other public defender in the

office, Michael Moses, assumed responsibility for representing petitioner.

After a trial in March 1982, petitioner was convicted of four counts of murder, and was sentenced to death. Dixon's testimony at trial provided the sole evidence directly linking petitioner to the murders. 903 F. 2d 1352, 1356–1357 (CA11 1990). In addition, both Dixon on cross-examination and the prosecutor in his closing argument acknowledged that Dixon was testifying under a grant of immunity,[1] a fact expressly credited by the trial court in its mandatory post-trial report, see Record, Respondent's Exh. 1, p. 54.[2]

After exhausting his state remedies, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, alleging, *inter alia*, that he did not receive effective assistance of counsel because his counsel labored under a conflict of interest. Although the District Court credited petitioner's contention that Dixon had received immunity in exchange for his agreement to testify against petitioner, 690 F. Supp. 1040, 1045 (1988), it nevertheless denied relief because petitioner had not shown an adverse impact on the representation of his *trial* counsel, Moses. *Ibid.*

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[1] In response to the question, "[H]ave you been promised anything for your testimony today?," Dixon stated, "Immunity." Record, Respondent's Exh. 1G, p. 649 (trial transcript). The prosecutor likewise acknowledged to the jury, "[W]e may have offered [Dixon] immunity. I think you realize that we did. I'll tell you that we did." Record, Respondent's Exh. 1I, p. 911 (trial transcript).

[2] Under Ga. Code Ann. § 17–10–35(a) (1990), the trial court must file a report in every case in which the death penalty is imposed. Designed to facilitate review by the Georgia Supreme Court, this report must include, *inter alia*, the trial judge's assessment of the prosecution's case at trial. See generally *Gregg* v. *Georgia*, 428 U. S. 153, 167–168 (1976) (joint opinion). The report in petitioner's case notes that Dixon was "[t]he witness most damaging to the defendant's case." Record, Respondent's Exh. 1, p. 54. It also states that "Dixon was granted immunity from prosecution and the jury was properly informed of this fact and an appropriate charge was given by the court to the jury." *Ibid.*

On appeal, the United States Court of Appeals for the Eleventh Circuit determined that the record was not sufficient for it to evaluate petitioner's conflict-of-interest claim, and therefore remanded to the District Court for an evidentiary hearing on that issue, while retaining jurisdiction over the case. 871 F. 2d 956 (CA11 1989). At the hearing, Kondritzer testified that while he was representing both petitioner and Dixon on the murder charges, he reached "an understanding" with the district attorney that "as long as [Dixon] testified [against petitioner] nothing would happen to him." Civ. Action No. 88–6–3–MAC (MD Ga., Sept. 20, 1989), p. 4. The District Court nevertheless concluded that petitioner had received representation free from a conflict of interest.

The case then returned to the Court of Appeals, which affirmed the District Court's denial of habeas relief. Although the court recognized the potential conflict of interest in Kondritzer's simultaneous representation of petitioner and Dixon, it held that "the conflict never became actual in the sense that Kondritzer's representation of Dixon's interests required him to compromise [petitioner's] interests." 903 F. 2d, at 1359. In addressing petitioner's argument that the dual representation adversely affected petitioner's interests because Kondritzer negotiated an immunity agreement for Dixon, the Court of Appeals stated:

> "[T]he assumption that Dixon received a grant of transactional immunity, negotiated by Kondritzer and the prosecutor in exchange for Dixon's testimony against [petitioner], is without factual support. . . . There is no documentary evidence of any sort that attests to Dixon's having received immunity . . . . Thus, [petitioner] can no longer base his conflict-of-interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another." *Id.*, at 1359–1360.

As petitioner argues, the Court of Appeals' finding that Dixon did not testify under an immunity agreement is contrary to the express finding in the state trial court's report that "Dixon was granted immunity from prosecution." Record, Respondent's Exh. 1, p. 54. This finding, made pursuant to statutory directive, see n. 2, *supra*, and based on Dixon's testimony and the prosecutor's closing argument at trial, see n. 1, *supra*, is a determination of historical fact "presumed to be correct" for purposes of a federal habeas corpus proceeding. See 28 U. S. C. § 2254(d).[1] A habeas court may not disregard this presumption unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met, and it explains the reasoning in support of that conclusion. See *Sumner* v. *Mata*, 449 U. S. 539, 549, 551 (1981). The Court of Appeals did not even *mention* the trial court's finding that Dixon received immunity, much less explain why that finding is not entitled to a presumption of correctness.

Respondent maintains that petitioner "waived" reliance on § 2254(d) in the Court of Appeals by failing sufficiently to emphasize the trial court's finding that Dixon received immunity. This contention mischaracterizes the record. In his first brief to the Court of Appeals, before remand, petitioner repeatedly stated, in support of his conflict-of-interest argument, that Dixon had testified under a grant of immunity. See Brief for Petitioner-Appellant in No. 88–8619 (CA11), pp. 5, 6, 8, 11, 13–14, 15, 17, 22, 23. Indeed, that factual assertion was the crux of petitioner's argument. In his supplemental letter brief, after remand, the immunity agreement was again the central fact supporting his conflict-of-interest

[1] Section 2254(d) provides in pertinent part:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . . ."

claim. The brief began by stating that petitioner did not understand why there was a dispute over Dixon's immunity, since the state trial judge had specifically found that Dixon had testified under a grant of immunity. Letter Memorandum for Petitioner-Appellant in No. 88–8619 (CA11), p. 1; see also *id.*, at p. 9. Petitioner then asserted that the state court's finding was "entitled to the presumption of correctness." *Ibid.* Thus, it seems clear that petitioner adequately raised the argument below.

Consequently, we reverse and remand so that the Court of Appeals may consider petitioner's conflict-of-interest claim free from its erroneous failure to credit the state trial court's finding that Dixon testified under a grant of immunity.

It is so ordered.